95-1734

Supreme Court, U.S.
FILED
APR 24 1996
CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

M.H.,

Petitioner,

v.

T.J., M.D., and C.J.,

Respondents.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

82 pp

QUESTION PRESENTED

Whether, when a court has found a parent incapable of caring for a minor child and also has found, by clear and convincing evidence, the parent's refusal to consent to the child's adoption to be contrary to the child's best interests, the Federal Constitution mandates that a State court give conclusive effect to the parent's designation of a custodian for the child.

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PETITION FOR WRIT OF CERTIORARI

Petitioner M.H. respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Superior Court of the District of Columbia, Family Division (App. *infra,* 31a) is unreported. The District of Columbia Court of Appeals decision (App. *infra,* 1a), No. 94-FS-140, 94-FS-274, 94-FS-277 (D.C. Sept. 21, 1995), is unreported. The District of Columbia Court of Appeals order (App. *infra,* 41a), No. 94-FS-140, 94-FS-274, 94-FS-277 (D.C. Apr. 17, 1996), is unreported.

JURISDICTION

The Superior Court of the District of Columbia entered its judgment on January 14, 1994. (App. *infra*, 31a). The District of Columbia Court of Appeals decided the appeal in this case on September 21, 1995. (App. *infra*, 1a). The Court of Appeals denied petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on April 17, 1996, with two judges dissenting. (App. *infra*, 41a). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend. XIV, § 1:

> No State shall . . . deprive any person of life, or property, without due process of law . . . .

D.C. Code Ann. § 16-2301(9)(C):

> The term "neglected child" means a child:
>
> . . .
>
> whose parent, guardian, or other custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity . . . .

D.C. Code Ann. § 16-304(e):

> The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by a writ of

certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT

A. Factual Background

This action arises out of Petitioner's efforts to adopt T.J., a six-year-old child for whom she has cared for as a foster parent for the past four years.

According to the unchallenged findings of the trial court, T.J.'s mother is afflicted with chronic schizophrenia which renders her unable to provide and care for T.J. (App. *infra,* 32a-33a). During the first 19 months of his life, she periodically placed him with the District of Columbia Department of Human Services ("DHS") or with his great-aunt by marriage. (App. *infra,* 33a). T.J.'s mother would invariably make demands for his return, often accompanied by outbursts of violence toward the great-aunt. (App. *infra,* 33a). The great-aunt consistently returned T.J. to his mother in compliance with these demands. (App. *infra,* 33a).

When T.J. was nineteen months old, DHS filed a dependency petition alleging that he was a neglected child. At that time, his great-aunt refused to take care of him, stating that she feared his mother would again cause a disruption in her home or would become violent. (App. *infra,* 5a). T.J. was therefore placed in shelter care at St. Anne's Infant Home. On January 23, 1992, T.J. was adjudicated a "neglected child" due to his mother's mental illness, pursuant to D.C. Code Ann. § 16-2301(9)(C) (1981). He was committed to the custody of DHS on March 31, 1992.

As a result of this troubled infancy, T.J. was physically aggressive, speech-impaired to the point of being almost mute, deficient in behavioral and learning skills, in emotional development, and in language development. T.J. made no progress in these areas while he was placed at St. Anne's. Visits from T.J.'s extended family were minimal. (App. *infra,* 33a).

DHS placed T.J. in Petitioner's custody in March 1992. The record reflects that great strides were made in T.J.'s physical and emotional development, attributed by the trial court to Petitioner's exceptional care. (App. *infra,* 34a).

In July 1992, a DHS social worker suggested that Petitioner consider adopting T.J. The social worker also spoke with the great-aunt, who said she could not provide a home for T.J. (App. *infra,* 7a). On November 5, 1992 Petitioner filed for adoption. Six months later the great-aunt filed for custody of T.J., but she did not consider adoption.

B. Proceedings Below

In considering the cross-petitions for adoption and custody, Superior Court Judge Eilperin applied a two-step process to ascertain the best interests of T.J. First, he found by clear and convincing evidence that it was contrary to T.J.'s best interests for his mother, who had previously been adjudged incapable of caring for her child due to her mental illness, to withhold consent to his adoption. (App. *infra,* 36a). Then finding that it was in T.J.'s best interests permanently to remain in Petitioner's care rather than in the temporary care of the great-aunt, the judge found by a preponderance of the evidence that custody with Petitioner was in T.J.'s best interests. (App. *infra,* 36a-39a).

The trial court based its decision that withholding consent to the adoption was contrary to T.J.'s best interests on the evidence of "[T.J.'s] fierce attachment to [Peti-

tioner], the wonders she has accomplished with him, her extraordinary parental abilities, and the serious risk that pulling [T.J.] away from her will permanently scar his development." (App. *infra*, 37a). The court relied on the opinion of the "most informative and persuasive" expert who testified before it. It found that "[m]oving now, even to a home as caring as [the great-aunt's], would be a disaster because of the very real risk that in destroying his trusting attachment to [Petitioner], [T.J.] will be unable to trust anyone." (App. *infra*, 39a).

Judge Eilperin recognized that, if T.J. were placed in the custody of his great-aunt, he would participate in the comings and goings of his extended family. He ultimately found, however, that this factor was outweighed "by the real and substantial risk of harm should [T.J.] be removed from [Petitioner's] care." (App. *infra*, 38a). Accordingly, the Superior Court entered an order granting Petitioner's adoption petition on January 7, 1994.

A panel of the District of Columbia Court of Appeals reversed, holding that the trial court had applied the wrong evidentiary burden and legal standard. The Court of Appeals held, as a matter of Federal constitutional law, that the clear and convincing standard must govern *both* the question whether the mother's consent was withheld contrary to the best interests of the child *and* the question whether the mother's choice of custodian was binding. Specifically, the panel ruled:

> We now . . . hold that unless it is established that the parent is not competent to make such a decision, a child and the natural parents share a vital interest in preventing erroneous termination of their natural relationship, and, therefore, a parent's choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest.

(App. *infra,* 16a). In the panel's view, even when the parent is unable to care for the child, and has been found by clear and convincing evidence to have withheld consent to adoption contrary to the child's best interests, the parent's choice of a custodian must be given overriding weight. Under the panel's approach, the trial court "erred in placing the mother's wishes on an equal footing with the other factors it considered." (App. *infra,* 17a).

The appellate court did not remand. Instead, it found that the evidence presented below could not have satisfied the clear and convincing standard and that the mother's designation of a custodian would be contrary to T.J.'s best interests. (App. *infra,* 28a).

In reaching its conclusions, the panel disregarded the opinion of the expert whom the trial court found to be most credible and concluded on its own that, notwithstanding his opinion, there was not a significant risk of harm to T.J. if he were to be taken away from Petitioner's home. On this basis, the panel awarded custody to T.J.'s great-aunt.

On October 5, 1995, Petitioner filed a petition for rehearing *en banc.* The District of Columbia Court of Appeals, with two judges dissenting, denied her petition on April 17, 1996. (App. *infra,* 41a).

REASONS FOR GRANTING THE PETITION

As set forth below, the decision of the D.C. Court of Appeals involves an important question of federal law bearing on the extent to which the Constitution limits the *parens patriae* powers of the States to protect the best interests of children. The particular issue involved —the deference that must be given the choice of a custodian by a parent who has been adjudicated incapable of caring for a child—has not been resolved by this Court. This issue should be addressed by the Court because the resolution below places unjustified constitutional limits on the ability of States to determine the

appropriate balance of the rights of parents and the best interests of children. Moreover, the decision below conflicts with applicable decisions of this Court setting forth the appropriate scope of due process protections.

I. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE DECISION BELOW EXTENDS THIS COURT'S PRECEDENTS IN AN UNSUPPORTABLE AND UNJUSTIFIED MANNER

In *Santosky v. Kramer,* 455 U.S. 745, 769 (1982), this Court concluded that, in a fact-finding proceeding to terminate parental rights, a State must prove its allegations by clear and convincing evidence. In its decision below, the Superior Court found that Petitioner had proved the factual basis for terminating the parental rights of T.J.'s mother by clear and convincing evidence. A panel of the D.C. Court of Appeals, however, concluded that this was insufficient. Relying on *Santosky,* it ruled that Petitioner was also required to prove by clear and convincing evidence that granting custody to the *designee* of T.J.'s mother was clearly contrary to T.J.'s best interests. In so holding, the D.C. Court of Appeals not only extended *Santosky* beyond its constitutional underpinnings, but also determined that the Constitution requires a burden of proof that has never been employed by this Court. The Court should grant the petition to correct this erroneous ruling.

A. The Constitution Does Not Require That a Foster Parent Seeking to Adopt a Child Prove by Clear and Convincing Evidence That Granting Custody to a Person Designated by the Parent Is Not in the Best Interests of the Child

The D.C. Court of Appeals rested its conclusions squarely on the recognition by this Court in *Santosky* of a natural parent's "fundamental liberty interest . . . in the care, custody, and management of their child." 455 U.S. at 753. Although the Court of Appeals looked

to precedent in the District of Columbia to provide further support for its conclusion, none of the cases cited provided an independent basis for the ruling. Similarly, the cases cited from other jurisdictions are neither determinative nor even persuasive. Indeed, as discussed in section III, States have reached widely differing conclusions about the weight to be accorded a parent's choice of custodian when the best interests of a child are at stake.[1] The validity of the ruling below must therefore rest on whether the "fundamental liberty interest" recognized in *Santosky* compels the burden of proof enunciated by the Court of Appeals.

In *Santosky*, this Court reiterated its conclusion in *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), that, in determining the procedural protections due to parents in cases involving the termination of their parental rights, courts should apply the test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). 455 U.S. at 754. That test directs the balancing of three factors in order to determine when a state procedure comports with due process requirements: the private interests affected by the proceeding; the risk of error created by the procedure, and the countervailing governmental interest supporting use of the challenged procedure. *Id.*

The *Santosky* Court concluded that the balance of those factors dictated that a State, in a fact-finding proceeding to terminate parental rights, must prove its allegations by clear and convincing evidence. *Id.* at 769. Without examining these factors, the court below ex-

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[1] The lack of any general consensus on this issue also compels rejection of the clear and convincing evidence burden. As this Court has noted:

> [T]he principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions.

Rivera v. Minnich, 483 U.S. 574, 578 (1987).

tended the clear and convincing evidence requirement well beyond the burden borne by a State in a proceeding to terminate parental rights. The decision below went badly astray, profoundly misreading the requirements of due process. Had the court below examined the factors that this Court has held to be determinative, it could not have reached the same conclusion.

1. *The Nature of the Private Interests Affected by the Proceeding Does Not Compel the Application of an Extraordinary Burden of Proof*

With regard to the first factor—the private interest involved—the *Santosky* Court found that the parents' interest in the continued custody of their child was the only private interest implicated by the proceeding there at issue. 455 U.S. at 758-59. Here, however, the parental interest is far more attenuated. The mother's interest in the continued custody of T.J. was resolved when the trial court found by clear and convincing evidence that the best interests of T.J. compelled the termination of those rights. The only parental interest at issue is the parent's interest in designating the custodian of T.J. notwithstanding the termination of parental rights.

Moreover, the parental interest is not the only private interest affected by the proceeding. The interests of T.J. and his foster mother weigh heavily against a requirement giving the parent's choice of custodian overriding significance.[2] In contrast to *Santosky*, where "[t]he fact finding [did] not purport—and [was] not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child," *id.* at 759, such a balancing was integral to the purpose of the proceeding

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[2] Although T.J.'s great-aunt is undoubtedly interested in the outcome of the proceeding, her legal interest is derivative of the mother's interest and it is independently entitled to no more weight than those of the foster parents in *Santosky*. The great-aunt is not related to T.J. by blood and has never provided more than brief custodial care for the child.

below.[3] Having concluded, by clear and convincing evidence, that T.J.'s mother was incapable of caring for him, the trial court (unlike the *Santosky* trial court) was free to consider that the interests of T.J. and his mother might thereafter diverge. *See id.* at 760. As the California courts have recognized, the promise of adoption into a stable and permanent family relationship dramatically alters the child's interest in the proceeding. *See* discussion at section II, *infra.* The California Court of Appeals has noted:

> the likelihood of adoption . . . changes the relative severity of the consequences of an erroneous decision on the child. With the likelihood of adoption, the child is subject to a dramatically different set of outcomes as a result of the termination hearing than was the case in *Santosky* or *Angelia P.* Instead of a bleak future in foster care limbo on the one hand, and return to a possibly abusive household on the other, the likelihood of adoption effectively realigns the consequences of an erroneous decision in termination proceedings: The alternatives are now life with a stable family who have already sacrificed for the sake of the child's well-being versus life with (more often than not) a single parent to whom return of the child has been repeatedly shown to be detrimental.

In re Cristella C., 8 Cal. Rptr. 2d 342, 346 (Cal. Ct. App. 1992).

Further, unlike *Santosky*, the instant case is not a state-initiated proceeding in which the foster parents' rights were "not implicated directly in the fact finding stage." 455 U.S. at 761. Rather, the adoption proceeding was brought by the foster mother, and pitted her interests directly against those of the other parties. The interests of T.J.'s foster mother are very much at stake in this proceeding. The *Santosky* Court noted that the

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[3] As noted above, however, the parental interest being balanced is different—designating the custodian of the child rather than raising the child.

foster parents could make their case for custody at the dispositional stage of the proceeding, or could bring their own action for custody. *Id.* at 761. Yet that was exactly what the foster mother did in the proceeding below. If the designation of a custodian by T.J.'s mother is to prevail over the trial court's conclusion that adoption by Petitioner is in the child's best interests, then Petitioner's interests will be just as completely and permanently terminated as would those of the parent in *Santosky*.

The interests of the foster parents cannot be dismissed lightly. As this Court has stated:

> [B]iological relationships are not exclusive determina[nts] of the existence of a family. . . .
>
> . . . [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deep and loving interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 843-44 (1977) (citation omitted). The trial court found that T.J. has made "great strides" in his foster mother's care, and has progressed "from an aggressive, disruptive, troubled child to a little boy who has a sense of trust and security in the world." (App. *infra*, 34a). It concluded that T.J.'s attachment to his foster mother is "intense and unique," and that his re-

moval from foster care would likely "permanently scar his development." (App. *infra*, 37a). To dismiss as inconsequential the interests of T.J.'s foster mother in this proceeding would exalt the biological relationship at the expense of a State's ability to recognize the same emotional relationships and socializing functions that this Court has recognized as important. *Smith*, 431 U.S. at 843-44. Under such circumstances, the nature of the private interests involved cannot be said to weigh in favor of the Constitution's imposing an extraordinary burden of proof on a foster parent who challenges a parent's designation of a custodian.

2. *The Risk of the Erroneous Deprivation of Private Interests Is Not Such As to Justify an Extraordinary Burden of Proof*

Santosky's analysis of the second *Mathews* factor—the risk of the erroneous deprivation of private interests—reveals another error in the analysis undertaken below. The *Santosky* Court was concerned that "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to amount a defense." 455 U.S. at 763.[4] In the proceeding below, the District of Columbia was not attempting to terminate the rights of T.J.'s mother. Indeed, it was not even a party to the adoption and custody proceedings and the D.C. professional case worker testified in favor of custody with T.J.'s great-aunt.[5] Even a cursory review of the proceedings below reveals that the lawyers, experts and other resources employed by those favoring custody with T.J.'s great-aunt were no less, and perhaps more, than those available to

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[4] Indeed, this Court has noted that the cases in which it has applied a higher standard than a preponderance of the evidence have involved conflicts between the state and individuals. *Rivera v. Minnich*, 483 U.S. at 581.

[5] *Cf.* 455 U.S. at 763 (expert representation and professional social workers available to State in termination proceeding). Although the District of Columbia was a party to the initial neglect proceeding, it was not seeking a termination of parental rights.

Petitioner. (*See* App. *infra*, 10a-12a). Each side presented three expert opinions. No fewer than three lawyers advocated custody with the aunt. Similarly, while T.J.'s parent and great-aunt would have no protection against future governmental efforts to intervene, *see id.* at 764, neither would T.J.'s foster mother, should she prevail.

Indeed, a holding that the Constitution mandates imposition of an extraordinary burden of proof on foster parents creates an unacceptable risk that the consequences of an erroneous decision will be borne by T.J. Unlike the situation in *Santosky*, where the likely consequence of an erroneous failure to terminate parental rights was "an uneasy status quo," 455 U.S. at 766, an erroneous grant of custody to the great-aunt would wrench T.J. from the only home he knows. The trial court's finding that removal from Petitioner's home would likely "permanently scar" T.J.'s development was not disturbed by the D.C. Court of Appeals. Nothing in the record suggests any comparable harm to T.J.'s mother or great-aunt.

In sum, once the basis for the termination of parental rights has been established by clear and convincing evidence, a State must have the latitude to fashion the appropriate distribution of the risk of erroneous decisions according to the State's assessment of the competing interests and the various circumstances under which those interests clash. Imposing an extraordinary burden would force children and foster parents to bear the majority of the risk without regard to severity of the potential harm. The allocation of risks cannot be said to argue in favor of the decision below.

3. *The Nature of the State's Interest Argues Against an Extraordinary Burden of Proof*

Finally, the State's interest is not well-served by requiring that a parent's choice of custodian can only be overcome by clear and convincing evidence that the choice is

clearly contrary to the child's best interests. Although the State is not prosecuting the termination of parental rights in an adoption proceeding, the State's interest remains the same: "*a parens patriae* interest in preserving and promoting the welfare of the child." 455 U.S. at 766.[6]

The *Santosky* Court acknowledged the validity of a State's goal to provide a child with a permanent home, but stated that such a goal must yield to preservation of natural familial bonds "while there is still reason to believe that positive, nurturing parent-child relationships exist." *Id.* at 766-67. The State's interest in finding an alternative home "arises . . . 'when it is clear that the natural parent cannot or will not provide a normal family home for the child.'" *Id.* at 767 (citation omitted). In this case, the trial court found, by clear and convincing evidence, that T.J.s mother could not provide a normal home. Under such circumstances, the States *parens patriae* interest in promoting the best interests of the child should be on equal, if not higher, footing than any residual interest of the mother in designating the child's custodian. The third *Mathews* factor, therefore, like the first two, argues against packing an extraordinary burden of proof on foster parents seeking to adopt.

4. *The Court Should Reject the D.C. Court of Appeals' Erroneous Balancing of the Mathews Factors*

The D.C. Court of Appeals bypassed the due process analysis mandated by this Court in *Mathews* and *Lassiter*,

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[6] The *Santosky* Court also noted the State's "fiscal and administrative interest in reducing the cost and burden of [termination] proceedings." 455 U.S. at 766. To the extent that fiscal and administrative interests are relevant in the instant proceeding, they heavily favor the facilitation of adoption, which will put an end to the State's fiscal burden of supporting the child and end the administrative burden of continued litigation and supervision through neglect proceedings.

and misconstrued the holding of *Santosky*, when it invoked—but did not analyze—the "fundamental right" of a parent in order to sustain a requirement that a parent's designation of a custodian can only be overcome by clear and convincing evidence. The result is an erroneous restriction on the ability of States to "experiment with various remedies" seeking "satisfactory solutions to the painful problem of child abuse and neglect." *Santosky*, 455 U.S. at 771 (Rehnquist, J., dissenting). As the dissent noted in *Santosky*, "the Court has scrupulously refrained from interfering with state answers to domestic relations questions . . . . '[S]ubstantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals.'" *Id.* (citation omitted). Although these concerns were overcome in *Santosky* by the need to protect the rights of parents, they must not prevail in this instance, where the *Mathews* analysis shows that the parental interest is limited and outweighed by many other, more substantial, interests.

If the court's decision below were based on D.C. statutes, or judicially-derived principles of D.C. law, there would be no occasion for this Court to review it. By instead basing its decision on constitutional due process protections, the D.C. Court of Appeals has called into question the ability of the fifty States to take contrary positions. The Court should reject an approach that could tend toward "the federalization of family law." *Santosky*, 455 U.S. at 773. As the Chief Justice further noted in his *Santosky* dissent:

> Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This

> Court has the power to prevent an experiment.' *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 . . . (1932) (Brandeis, J., dissenting). It should not do so in the absence of a clear constitutional violation.

Id.

B. The D.C. Court of Appeals Imposed a Burden of Proof That Goes Beyond Any Due Process Requirement Recognized By This Court

Finally, the implications of the lower court's imposition in family court proceedings of a new, hitherto unknown, burden of proof provide an additional reason for the Court to grant this Petition. The D.C. Court of Appeals did not merely rule that Petitioner must show by clear and convincing evidence that the mother's designation of a custodian was not in the best interests of T.J., but rather held:

> a parent's choice of a fit custodian for [a] child must be given weighty consideration which can only be overcome by a showing, *by clear and convincing evidence*, that the custodial arrangement and preservation of the parent-child relationship is *clearly* contrary to the child's best interest.

(App. *infra*, 16a) (emphasis added). The burden thus established by the D.C. Court of Appeals is unique. Petitioner is unaware of any case where this Court, or any court, has found that the Constitution requires a factual premise to be proved "clearly" *and* "by clear and convincing evidence." This Court has repeatedly recognized only three burdens of proof in trial courts: a preponderance of the evidence; clear and convincing evidence; and beyond a reasonable doubt. *See, e.g., California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90, 93 (1981). The burden created by the D.C. Court of Appeals, however, is somewhere in between—apparently greater than simple proof by clear and convincing evidence—but is presumably less than proof beyond a reasonable doubt.

Although not presenting the same hybrid of appellate and trial standards, the burden created by the D.C. Court of Appeals is no more coherent than that rejected by this Court in *Concrete Pipe and Prods. of California, Inc. v. Construction Laborers Pension Trust Fund for Southern California*, 508 U.S. 602, 113 S. Ct. 2264 (1993). The Court equated the standard in that case with a trial standard of "probably true beyond a reasonable doubt." 508 U.S. at ——, 113 S. Ct. at 2281. "Clearly" contrary to a child's best interests, proved by "clear and convincing evidence," is no less absurd merely because both components point in the same direction. The Court should reject constitutional interpretations that will only yield confusion.

II. THE COURT SHOULD GRANT THIS PETITION TO RESOLVE DIVERGENT DETERMINATIONS OF THIS ISSUE BY STATE COURTS

Only a few state courts have addressed the issue of whether the "clear and convincing evidence" requirement of *Santosky* applies to other issues in adoption and custody proceedings, such as the fitness of a custodian designated by a parent. Unlike the D.C. Court of Appeals, however, those courts have generally recognized that extending that requirement to the designation of custodians or other post-termination issues would inappropriately and unnecessarily restrict the States' ability to exercise their *parens patriae* powers.

At least one other State's high court has explicitly refused to extend *Santosky's* protections to a parent's right to designate the child's custodian. The West Virginia Court of Appeals considered such a designation irrelevant when sufficient grounds existed to terminate parental rights. *Nancy Viola R. v. Randolph W. and Grady W.*, 356 S.E.2d 464, 470 n.9 (W. Va. 1987).[7] Similarly, in

[7] In *Nancy Viola R.*, the termination of parental rights was based on a finding of unfitness. The D.C. Court of Appeals tried to dis-

a case predating *Santosky*, the Appellate Division of the New Jersey Superior Court concluded that, even though parental rights could not be terminated absent clear and convincing evidence of very substantial neglect, the fitness of a custodian preferred by the parents was irrelevant to that determination. *J. and E. v. M. and F.*, 385 A.2d 240 (N.J. Super. Ct. App. Div. 1978).

Similarly, the California Supreme Court has refused to extend *Santosky* beyond its due process underpinning to other aspects of custody and adoption proceedings. In *Cynthia D. v. San Diego County Dep't of Social Servs.*, 851 P.2d 1307 (Cal. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1221 (1994), that court rejected arguments that the clear and convincing evidence standard applied not only to the determination of the factual predicate for termination, but also to subsequent findings. Petitioners in *Cynthia D.* contended that the California statutory scheme, which requires a finding of clear and convincing evidence when the child is initially removed from the home, violated the requirements of *Santosky* because it failed also to require proof by clear and convincing evidence of necessary findings later in the proceedings that the return of the child to the home would be detrimental. In a carefully reasoned opinion, applying the *Mathews* analysis that the D.C. Court of Appeals eschewed, the California Supreme Court concluded that due process did not dictate such a burden. Particularly relevant is the court's analysis of the private interests at stake. The court pointed out that, at the "selection and implementation"

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tinguish this case, in which the finding of neglect was based on the parent's mental illness, from a case where a parent has been found abusive or unfit. (App. *infra*, 23a). The D.C. Code, however, does not differentiate neglected children according to the basis for the neglect finding. Any finding of neglect under D.C. Code § 16-2301(9) can provide the prerequisite for the termination of parental rights. The suggestion of the D.C. Court of Appeals that constitutional rights should be determined by distinctions that have no statutory basis only highlights the confusion that could arise from the decision below.

stage, when parental inadequacy has already been established, the interests of the parent and child have diverged. *Cynthia D.*, 851 P.2d at 1314. Especially when adoption is likely, the child's "fundamental interest in the opportunity to experience a stable parent-child relationship" was very much at stake. *Id.*[8] Nowhere is such likelihood greater than in an adoption suit, such as the proceeding below.

The ruling below thus conflicts with the decisions of courts in several States, which declined to recognize the constitutional entitlement upon which the decision below rested.

III. THE COURT SHOULD GRANT THIS PETITION TO CLARIFY THE IMPORTANT QUESTION OF THE SCOPE OF CONSTITUTIONAL IMPEDIMENTS TO THE STATES' EXERCISE OF THEIR PARENS PATRIAE POWERS

The proceeding giving rise to this Petition provides the Court with the opportunity to clarify the extent to which the Constitution limits the ability of States, in the exercise of their *parens patriae* powers, to determine the appropriate balance between the best interests of a child and the parent's interest in controlling the custodial circumstances of that child. The scope of the constitutional protection due interests of parents, when confronted by the interests of children or the *parens patriae* power of the States, is an issue of extreme moment that has been addressed by this Court in a variety of contexts.[9]

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[8] *See also In re Cristella C.*, where the California Court of Appeal asserted that "[g]iven the fundamental choice in such a case as this—when a stable family is likely to adopt unless there is an erroneous nontermination—we cannot believe that the *Santosky* majority . . . and (most certainly) the *Santosky* dissenters, would not agree with us that the relative severity of the consequences of an erroneous decision—one way or the other—are at least roughly equal." 8 Cal. Rptr. 2d at 347.

[9] *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (State may require minor seeking abortion in

Although this Court has determined that due process requires the factual basis of a termination of parental rights to be proven by clear and convincing evidence, it has not extended that burden to such additional factual determinations as the fitness of a custodian designated by the parent. The Court should grant this Petition to provide guidance regarding limitations imposed by the Federal Constitution on the States' authority to make those determinations in the best interests of the child.

Not surprisingly, state courts have been called upon to balance the competing interests of parental rights and a child's welfare in diverse factual and statutory circumstances, and have reached very different conclusions. Only rarely have state courts been called upon to go beyond *Santosky* in determining burdens of proof when balancing a parent's preferences against the child's best interest in the context of the termination of parental rights. Nonetheless, the inconsistency of these decisions demonstrates the diversity of the States' exercise of their *parens patriae* powers.

As discussed in section II, *supra*, courts in California and West Virginia, addressed this issue in the constitutional context. In these cases, the best interests of the child prevailed. Two other States, without reaching constitutional issues, gave less weight to the child's best interests, concluding that more than clear and convincing evi-

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ex parte proceeding to justify parental bypass by clear and convincing evidence); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (State requirement that both parents be notified of abortion unconstitutional); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (State may determine burden that parental guardians must meet in order to terminate life support of comatose child); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Interest of natural father subordinate to state interest in preserving traditional familial relations through presumption of legitimacy); *Parham v. J.R.*, 442 U.S. 584 (1979) (State may allow parents to make certain decisions regarding the commitment of mentally ill minors); *Qulloin v. Walcott*, 434 U.S. 246 ((1978) (State need not allow natural father to veto adoption of child).

dence of neglect or abandonment is necessary before the State will terminate parental rights over a parent's objection. The Court of Appeals of Kentucky has held that when considering a petition to adopt a child without a parent's consent based on abandonment or neglect, the court must require clear and convincing evidence that the parent wilfully engaged in such conduct. Proof of mental incompetence or incarceration does not suffice, even when it would be "the cruelest act a court could perform" to return the child to the mother. *D.S. v. F.A.H. and M.A.H.*, 684 S.W.2d 320, 321, 323 (Ky. Ct. App. 1985). In *Martin v. Putnum*, both parents were incompetent to care for their child due to their severe mental disorders and incarceration. 427 So. 2d 1373 (Miss. 1983). The adequacy of the proof that they could not care for their child does not appear to have been in issue. The court below found that, even though a grandparent requested custody, adoption was in the best interests of the child. Nonetheless, the Supreme Court of Mississippi overturned the adoption, noting that the parent withheld consent. *Id.* at 1377.[10]

In other contexts, States have taken very different approaches to addressing conflicts between parents' wishes and the States' *parens patriae* concern for the best interests of the child. For example, in *Worley v. Jackson*, involving a mother who was unable to care for her children because she was incarcerated, the Supreme Court of Mississippi awarded custody to the party opposed by the mother over the mother's preference for an alternate custodian. 595 So. 2d 853 (Miss. 1992). Apparently adhering to a best interest of the child standard, the court stated that the mother was "unable to care for [her]

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[10] *See also Logan v. Fairfax County Dep't of Human Dev.*, 409 S.E.2d 460 (Va. Ct. App. 1991) (acknowledging mother's standing to challenge adequacy of court's compliance with statutory requirement to consider placement with relatives, even though mother's rights were terminated in proceeding and mother did not request such consideration).

children" and rejected the argument that her designation should be honored because it "was a legitimate exercise of her right and duty to control her children." *Id.* at 855. *See also Commissioner of Social Servs. ex rel. Riddle v. Rapp,* 487 N.Y.S.2d 477 (Family Ct. N.Y.C. 1985) (In determining a child's placement pending a termination of parental rights proceeding, the court placed no weight on the mother's preference for discharge to the mother's family, extending the placement with the foster parents); *State in Interest of L.L.,* 625 A.2d 559 (N.J. Super. Ct. App. Div. 1993) (In refusing to remove the child from long-term foster care because it was not in the child's best interests, the court gave no special weight to the incarcerated father's designation of his relatives as custodians).[11]

In contrast, the Supreme Judicial Court of Massachusetts has held that, at least where neither the parent nor the designated custodian has been found unfit or unsuitable, the judge is bound to honor his or her wishes on the choice of guardian. *Freeman v. Chaplic,* 446 N.E.2d 1369, 1375 (Mass. 1983) (concluding that granting custody to a suitable party opposed by the fit parents would not measurably advance any interest of the State and would raise serious constitutional difficulties).

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[11] A number of decisions predating *Santosky* reached similar conclusions. *See In re Cooper,* 410 P.2d 475 (Utah 1966) (mother's preference for custodian, entitled to due consideration by statute, rejected because such preferences "cannot be made absolutely controlling" when balanced against the best interests of the child); *Akin v. DeBerry,* 290 S.W.2d 388 (Tex. Cir. App. 1956) (holding that the desire of either parent is not controlling in a custody case); *Scanlon v. Scanlon,* 102 A.2d 656 (N.J. Super. Ct. App. Div. 1954) (where mother was incompetent to care for her child due to mental illness, court chose foster care over mother's preference for a custodial arrangement with relatives); *Stanley v. Whitney,* 259 S.W.2d 636 (Tx. Civ. App. 1953) (desires of the parent as to child's custodian are not controlling when conflicting with best interests of the child).

The choice faced in these cases between a child's best interest and deference to a parent's choice of custodian is only one example of the many conflicts between the States' exercise of their *parens patriae* powers and other competing interests. For example, States must determine how much weight to give a deceased parents preferences,[12] to a parental desire to place the child for adoption,[13] and to parental preferences as to foster placement.[14] As this Court has noted, the decisions to be made in such circumstances have been entrusted, under our constitutional scheme, to the States. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family . . . arrangements." *U.S. v. Yazell*, 382 U.S. 341 (1966). *See also Rivera v.*

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[12] *See, e.g., Lamar v. Zimmerman*, 169 N.W.2d 819 (Iowa 1969); *In re Guardianship of the D. Children*, 576 N.Y.S.2d 136 (N.Y. App. Div. 1991), *appeal dismissed*, 590 N.E.2d 247 (1992); *Merrill v. Berlin*, 54 N.E.2d 674 (Mass. 1944). In the same context, a deceased parent's designation has been held as not dispositive or it has not been given greater weight than the best interest of the child. *State ex rel. Van Loh v. Prosser*, 98 N.W.2d 329 (S.D. 1959); *In re Lewis*, 152 A.2d 666 (Pa. 1959); *In re Lippincott*, 124 A. 532 (N.J. Ch. 1924), *aff'd*, 128 A. 254 (N.J. 1925).

[13] *See State ex rel. Fisher v. Devins*, 200 N.W.2d 28 (Minn. 1972) (best interest of child prevailed over mother's preference); *Sickler v. Roach*, 564 N.Y.S.2d 603 (N.Y. App. Div. 1991) (court followed parent's choice to surrender child to agency rather than grant custody to grandparent).

[14] *See, e.g., In re Welfare of Key*, 836 F.2d 200, 202 (Wash. 1992) (mother of severely physically handicapped child had statutory right to veto foster placement unless State can prove, by "clear, cogent and convincing evidence," that its choice of custodian was in the "best welfare of the child"), *cert. denied*, 507 U.S. 927 (1993); *Hope E. H. v. Margaret R.*, 1994 WL 811750 (Del. Fam. Ct. 1994), (custody taken from foster parents, with no proof of neglect, because court "must place substantial weight upon the natural parents' wishes as to the custodial and residential arrangements of their minor child"); *Bernhardt v. Lutheran Social Servs. of the Nat'l Capital Area, Inc.*, 385 A.2d 1197 (Md. Ct. Spec. App. 1978) (a parent's desires were "relevant evidence" in withdrawing child from foster placement).

Minnich, 483 U.S. at 582 (O'Connor, J., concurring); *Santosky*, 455 U.S. 352 at 771 (Rehnquist, J., dissenting). The Court should act to prevent extensions of the reach of the Constitution into such areas. It is for these reasons that it behooves the Court to grant this petition—not to establish the standards States must apply when evaluating a parent's designation of a custodian—but to clarify that the Constitution does not limit the ability of States to establish their own priorities in the exercise of their *parens patriae* powers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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April 24, 1996

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APPENDIX

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 94-FS-140
94-FS-274
94-FS-277

IN RE: T.J., M.D., & C.J., APPELLANTS,

Appeals from the Superior Court of the
District of Columbia

(Hon. Stephen F. Eilperin, Trial Judge)

(Argued May 11, 1995 Decided September 21, 1995)

Before WAGNER, *Chief Judge*, and STEADMAN and KING, *Associate Judges.*

KING, *Associate Judge:* T.J., a five-year old boy ("adoptee," "child," or "T.J."), M.D., T.J.'s maternal great-aunt ("great-aunt"), and C.J., T.J.'s mother, ("mother," "natural mother," or "C.J."), are appealing the Superior Court's order granting the adoption petition of M.H., T.J.'s foster mother, ("foster mother") and denying the custody complaint of the great-aunt. The neglect, adoption, and custody cases were consolidated, and the adoption and custody issues were tried before Judge Stephen F. Eilperin in November 1993. The parties to the consolidated cases were the District of Columbia ("District"); the child, through his court-appointed guardian *ad litem*; the foster mother, the adoption petitioner; the great-aunt, the custody complainant; and, the child's parents, the mother and D.L. ("the father"). At trial, the District, the guardian *ad litem*, and both the child's parents supported the great-aunt's custody petition. We reverse.

I. Procedural History

A. The Neglect Case

The proceedings began in the trial court as a petition filed by the government on April 17, 1991, pursuant to D.C. Code § 16-2301 *et seq.*, alleging that the child, then 19 months old, was a neglected child. Following an initial court hearing, held the same day, the court found probable cause to support the neglect allegations and placed the child in shelter care with the D.C. Department of Human Services ("DHS"). The child was subsequently placed at St. Anne's Infant and Maternity Home ("St. Anne's"), an institutional facility for neglected children, where he remained for approximately one year. On January 23, 1992, following a trial on the neglect petition, Judge Gregory E. Mize adjudicated the child neglected pursuant to D.C. Code § 16-2301(9)(C),[1] because of the mother's mental illness. Judge Mize specifically rejected a neglect adjudication pursuant to D.C. Code § 16-2301(9)(B), because the child was not without "proper care or control, subsistence, education . . . or other care or control necessary for his physical, mental or emotional health." DHS then, through a private foster-care agency on contract with DHS, For Love of Children ("FLOC"), placed the child in foster care with the foster mother and

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[1] D.C. Code § 16-2301(9) in relevant part provides:

> The term "neglected child" means a child:
>
> (A) who has been abandoned or abused by his or her parent, guardian, or other custodian; or
>
> (B) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian; or
>
> (C) whose parent, guardian, or other custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity.
>
> * * *

J.S., her female companion. On March 31, 1992, following a disposition hearing on the neglect case, the trial court entered a disposition order committing the child to DHS.

Thereafter, the trial court conducted regular review hearings in the neglect case during which the court received information on the mother's condition, including psychiatric evaluations and assessments. On July 8, 1992, the great-aunt appeared in court and expressed interest in obtaining custody of the child. On November 5, 1992, having been advised that DHS and FLOC would be recommending an immediate change in placement for the child to the great-aunt's home, the foster mother filed a petition to adopt the child. On May 24, 1993, the great-aunt filed a complaint for custody, which was consolidated with the neglect and adoption cases.

B. The adoption petition and custody complaint dispositions

The trial court conducted a seven-day fact-finding hearing on the adoption petition and custody complaint on November 15-19 and 22-23, 1993, at which the foster mother, her partner, and the great-aunt testified. The mother, who appeared briefly on one day of the proceedings, did not testify. The father did not appear. Both the child's parents, however, supported the great-aunt's custody complaint. A total of sixteen witnesses testified, and a number of reports and exhibits were received into evidence. On January 7, 1994, the trial court entered an order granting the foster mother's adoption petition, denying the great-aunt's custody complaint, and effectively terminating the mother's parental rights.

Concluding that there was no real possibility that either biological parent could raise the child, the court found, by clear and convincing evidence, when pitting the foster mother against the natural parents, that the parents were withholding their consent to the adoption contrary to

T.J.'s best interest. In the contest for custody between the great-aunt and the foster mother, the court found, by a preponderance of the evidence, that it was in the best interest of the child to grant the foster mother's adoption petition. The court found that both the foster mother and the great-aunt would provide T.J. with a warm and loving home, and that he would have a clearer sense of his racial, cultural, and family identity if he was raised by the great-aunt with his extended family. Nevertheless, because of the strong attachment that had formed between the child and the foster mother, the court determined that the risk of harm to the child if he was removed from his foster mother's care outweighed those considerations. Thus, concluded the trial judge, it was in the child's best interest to be adopted by the foster mother. This consolidated appeal followed. Because the parties contentions focused on the weight of the evidence and the parties' relative evidentiary burdens, we will set forth the evidence in some detail.

II. Facts

A. Events leading to the Custody and Adoption Petitions

The child, an African-American boy, was born September 15, 1989, to mother, C.J., and father, D.L. He lived with his mother until he was nineteen months old. The mother suffers from a chronic mental illness (schizoaffective disorder) which, even with treatment, renders her unable to take care of her son on any kind of long-term basis. The child's father has never lived with the mother or the child, has never been involved in the child's life, and has no plans to assume care of the child.

The child was first brought to DHS's attention by his mother in November 1990, when she requested that DHS temporarily place her son in its care because she was experiencing mental problems and was afraid she would not be able to provide appropriate care for him. Several days later, DHS returned the child to her care. Over the next five months, on about four occasions, the mother

requested and received emergency care placement for the child for periods of three to ten days because she was overwhelmed with the task of caring for him. On some of these occasions, the child was placed with his great-aunt. In February 1991, the mother placed the child in voluntary foster care at St. Anne's for one month, after which he was returned to her care. On April 17, 1991, the mother again indicated her inability to care for the child and the District filed a neglect petition alleging, *inter alia,* that the mother was unable to care for the child due to mental illness. The child, then nineteen months old, was placed at St. Anne's. During that period, the great-aunt was unwilling to care for the child for an extended period without the mother's consent or a court order giving her custody. The great-aunt testified that she was seeking to avoid a repetition of the conflicts she had encountered with the mother, including threats of violence and vandalism to her home by the mother, which occurred ten years earlier, when the great-aunt assumed custody of A.J., the mother's twelve-year old daughter, who is T.J.'s sister.

The child remained at St. Anne's for approximately one year pending a fact-finding hearing and disposition. During that time, he experienced behavioral, emotional, learning, and speech problems attributed to his early chaotic life with his mother. St. Anne's initiated behavioral, language and speech therapy, which continued some time after his placement with his foster family. The mother visited the child frequently during his stay at St. Anne's, and the great-aunt visited him once, because she would not "go over [the mother's] head" by visiting the child. On July 8, 1992, three months after the child was committed to foster care with the foster mother, the great-aunt appeared in court and expressed an interest in obtaining custody of the child. She later filed a custody complaint on May 24, 1993.

B. The Foster Care Placement

The foster mother became a foster parent through FLOC, an organization which administers a program for foster care. Before M.H. became T.J.'s foster mother, she, and her companion, J.S., attended a FLOC training program, where they were instructed that foster care is a temporary service, with a goal of returning the child to the birth family, first to the birth parents, if possible, and then to birth relatives. The foster mother signed a contract to that effect.

In the first few months while the child lived with his foster mother, he continued to exhibit severe behavioral and emotional problems—tantrums, hysterical crying, physical aggression, sleep problems, aimless and unfocused movement and motor activity, destructive play, and inability to relate to people. Additionally, he only spoke between ten to twenty words. He became clingy towards his foster mother, making separation from her very difficult, and was withdrawn and non-responsive towards others at school and home. His behavior improved after a few months in foster care. The child became talkative, his tantrums subsided, and he displayed a significant interest in physical activity. At the home of his foster mother, the child has his own room and access to a recreation room, a den, and a backyard in which he can play. The child attends an interracial kindergarten and interacts well with children there. He attends church and has friends of various races. The foster mother and her companion, who are both white, have taken the child to various African-American festivals and celebrations, read books to him with African-American characters and have posters of Martin Luther King and of black children portrayed in a positive way. The child is fully integrated into his foster family, his school and church, and his multicultural, multi-racial neighborhood and community. The foster mother has a close network of friends and acquaintances, both married and single, through school, work, church and her neighborhood.

When the child was first placed with his foster mother, the agency goal was reunification with his mother. The foster mother complied with the court-ordered visitation with his natural mother and great-aunt, but made no attempts to add extra visits, lengthen visits or add makeup visits. The FLOC social worker testified that she found it difficult to get the foster mother and her companion to cooperate with regard to permanency planning. The relationship between FLOC and the foster mother deteriorated to the extent that FLOC notified the foster mother in writing that she had breached their contract, and would be terminated as general foster parent, retaining that status only as to T.J. during the pendency of this case.

In July 1992, DHS referred T.J.'s case to its "Project 237."[2] The Project 237 social worker assigned to T.J.'s case determined that reunification with his mother was not feasible. On July 6, 1992, the social worker contacted the foster mother's companion, and initiated discussion as to whether the foster mother and her companion would be interested in adopting the child. The social worker also contacted the great-aunt, who indicated that she was not prepared to offer the child a home at that time. The social worker informed the great-aunt of the upcoming court review scheduled for July 8, 1992. The great-aunt attended the July 8, 1992 review hearing, and the judge, without addressing the issue of the child's permanent placement, authorized experimental, overnight/weekend visits for the child with his great-aunt at FLOC's discretion. The social worker testified that the great-aunt did not begin visits with the child until September 11, 1992, followed by a late October visit. Both these meetings took place at FLOC. After these two visits, the

[2] A special corrective action project developed to address the need for permanency planning in cases of children who had been in foster care for more than eighteen months with an unmet case plan goal of "reunification." Project workers investigated whether reunification remained a realistic goal and, if not, developed alternative permanency recommendations.

FLOC social worker indicated that she wanted to schedule weekend visits, and the foster mother's companion indicated that she did not think that was appropriate because of the child's reactions and regressions after visits with his mother, and during and after the two visits with his great-aunt at FLOC. It was at that point that the foster mother and her companion learned that FLOC would be recommending an immediate change of placement for the child at the scheduled November 18, 1992 court review. The foster mother testified that after consulting with various child mental health professionals, including the child's therapist, she filed the instant petition for adoption on November 5, 1992.

At the November 18, 1992 review hearing, the judge rejected the agency's recommendation for an immediate change of placement, instead ordering an independent psychiatric assessment to evaluate the child's psychological bonding and the effect, if any, a move to his great-aunt's home would have on him. He also ordered a home study of both the great-aunt and the foster mother by the Court's Social Services Division, and experimental, overnight/weekend visits with the great-aunt at FLOC's discretion, but not to exceed once every two weeks.

C. The Parties' Backgrounds

The trial court made the following findings of fact concerning the relevant parties. M.H. and J.S., the foster mother and her companion, are a white lesbian couple who have been together for over five years. M.H., then thirty years old, is an attorney, and J.S., then forty-nine years old, has a masters degree in developmental and educational psychology, and is employed as a sociologist with the Children's Defense Fund. They both have extensive experience with children's issues through their professional and volunteer work. They are a stable, emotionally mature couple, who have established a comfortable home together in a multi-racial, multi-cultural, upper

middle-class neighborhood. They are both actively involved in their church's educational and public service activities. They have a network of friends available to take care of the child should it become necessary, but have no relatives on whom they could rely.

M.D., then sixty years old, is the adoptee's great-aunt by marriage, who lives in a single-family home with a fenced-in backyard in the Mount Pleasant area of the District of Columbia. She has successfully raised eight children of her own. She has previously provided a home for the adoptee's mother, and she has had custody of the adoptee's sister, A.J., the natural mother's twelve-year old daughter, since the girl was two years old.[3] Two of the great-aunt's older sons live with her, and her other children visit with her regularly. Her home is the hub of a large and extended African-American family where the child has several individuals responsible for meeting his needs. As of November 1993, the adoptee, who had spent approximately twenty-five weekends in the great-aunt's home, appeared, to various observers, to be comfortable there and to interact warmly with the individuals in the home, especially his sister.

One of the great-aunt's sons, G.P., is a narcotics investigator with the Metropolitan Police Department who lives with his wife and two children, ages eleven and seven. The great-aunt takes care of G.P.'s children every weekend, and G.P. and his wife expressed a willingness to help with the adoptee should the need ever arise. The great-aunt's daughter, R.L., a management specialist at Walter Reed Army Medical Center, is married with two children, a three-year old and a ten-year old. The great-aunt takes care of these children while R.L. is at work. The trial court found that R.L. and her husband stand ready to offer the adoptee a home should anything happen

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[3] C.J., the natural mother of T.J., is also the natural mother of A.J., the twelve-year old girl who has been cared for by the great-aunt for ten years. Apparently A.J. and T.J. have different fathers.

to the great-aunt. The trial court recognized that the great-aunt is "an extraordinary person. She is a strong, loving, dignified, highly moral, religious person." She has significant experience in raising her own children, and the trial court found that she has also raised the adoptee's sister with love, care and skill, and that the sister is a well-adjusted twelve-year old who excels in school and has a firm sense of herself.

D. The Expert Opinions as to T.J.'s Best Interest

The trial court heard testimony from two psychiatrists called in support of the foster mother's adoption petition, two psychologists called in support of the great-aunt's request for custody, and several other experts regarding the impact on the child of a change of placement from the foster mother's home to the great-aunt's home. The expert opinions were divided as to which placement would serve the child's best interest. The witnesses for each side agreed that both the great-aunt and the foster mother were able to provide safe, loving, nurturing home environments and a proper education for the child. All the witnesses also acknowledged the advantage of placement with the great-aunt, who was able to provide the benefits of her extended family and its connecion to the African-American culture and male role-models. The experts disagreed, however, on the extent of the child's attachment to the foster mother, and the harm to the child that would result if he were returned to his family.

1. The Experts who Supported the Great-aunt's Custody Complaint

The great-aunt called Dr. Ronald Wynne, a forensic psychologist, who testified that he had examined the child and found that a bond existed between the great-aunt and the child, and between the child and his sister. He found the child's relationship to his sister to be significant to his development, stating:

> I like the relationship between those two children. She's crazy about him and he seems to be crazy about her. They are likely to have a relationship that would last 60, 70, 80 years, closely bonded. That would be wonderful.

Dr. Wynne also testified that living in the great-aunt's multi-generational home would strengthen the child's self-image and his experience of family. Dr. Wynne opined that the transition to the great-aunt's care would go well because the child was able to bond with the great-aunt, and that there would be no enduring consequences if he were placed with her.

Dr. Beverly Davis, the administrator for the District's Family Services Administration, also testified on the great-aunt's behalf. She opined that the best place for the child was with his great-aunt, stating that the evidence of the great-aunt's ability to be a good parent to the child was her ongoing success with his sister. Dr. Davis concluded that the child is really part of his great-aunt's family:

> African-American families have a long standing tradition of having extended kin who may not be biologically related, but are related in terms of the relationship of that family. And that is exceedingly important in our definition of self and has been one of the hallmarks that I think have been important in terms of our own survival as a people.

She agreed with Dr. Wynne on the significance of the child being raised in his great-aunt's home but gave no opinion on the psychological impact the change to the great-aunt's household would have on him.

Dr. Frederic Phillips, a clinical psychologist who specializes in child-family psychology, was called by the child's guardian *ad litem*, strongly advocated the child's move to his great-aunt's home. He testified that a child is expected to attach to the foster parent, and, indeed,

that an important quality of a good foster-care arrangement is such an attachment. He testified, however, that the existence of an attachment does not become the "riveting reason for what should happen in the permanent interest of that child." Dr. Phillips echoed both Drs. Wynne's and Davis's opinion on the advantages of the great-aunt's home in terms of providing the child with a strong sense of his cultural, racial, and gender identity. He opined that the child's racial identity was a process that could not be created merely with pictures of Martin Luther King and an occasional visit with a black, male role model. He determined that the child would be able to move through the transition process comfortably with appropriate social work.

2. Experts Supporting the Petition for Adoption

Dr. Floyd Galler, a child and adult psychiatrist, testified that the child had developed an attachment to his foster mother that should not be broken. He opined that taking the child from the foster mother would inflict permanent scarring, short-term sadness, a life-long risk of depression and difficulty forming a conscience. Dr. Galler testified that, in a trans-racial adoption, there are special steps that adoptive parents can take to supplement the child's unbringing, to help the child develop a comfortable sense of his or her racial identity. Dr. Galler did not believe that the benefits of placing the child with the great-aunt outweighed the risk of moving him.

Dr. James Eagan, a child and adult psychiatrist, testified that the most important psychological task for a child to develop to become a healthy adult is to form an attachment to a caretaker or several caretakers. Dr. Eagan believed that moving the child from his foster mother would substantially increase the risk that he would not be able to attach again. Dr. Eagan opined that it was in the child's best interest to remain in the foster mother's home. Ms. Betty Brooks, the child's therapist, also testified in support of the adoption.

Dr. Galler, Dr. Eagan, and Ms. Brooks all testified that moving the child would be harmful in light of his early chaotic life, his history of multiple moves and institutionalization, his early and severe behavioral and emotional problems and delays, and his strong, trusting, parent-child attachment to his foster mother. No matter what he was told, the child would view the move to his great-aunt's home as an abandonment by the "parents" he had come to trust; severing the attachment would result in long-term serious harm to the adoptee, who was still a vulnerable child. Finally, these experts testified that contrary to the potential harms faced by the child if he were moved, no "affirmative" harm would result if he were allowed to be adopted by the foster mother.

III. The Trial Court's Findings

The trial judge found that the adoptee, who had been a seriously disturbed child, had "blossomed" into a happy, active, normal,, although still vulnerable little boy and that this was attributable to the foster mother's extraordinary parental abilities and her consistent nurturing and love. The judge found that against long odds, the child had succeeded in establishing a son/mother attachment with his foster mother, and that bond should not be severed. The trial court set forth the evidentiary burdens of the great-aunt and the foster mother as follows:

> To the extent these cases are a contest between [the great-aunt and the foster mother], neither enjoys a presumption that she should prevail. What is best for [the child] is to be decided by a preponderance of the evidence. And although they stand on equal footing in terms of their evidentiary burdens [, the great-aunt] as the choice of [the child's] parents and as a close family member obviously has weighty considerations in her favor.

The court then addressed the evidentiary burden of the foster mother versus the natural parents, focusing on the

ability of the natural parents to raise the child themselves, and ruled that the foster mother "must convince the court by clear and convincing evidence that the parent['s] opposition to the adoption is contrary to [the child's] best interest." While acknowledging that the parents' wishes were important considerations in deciding whether the great-aunt should have custody, or whether the foster mother should be allowed to adopt, the court gave no significant weight to that factor. Indeed, the trial court gave the parents' wishes no more weight than it gave any other factor. The trial court then granted the adoption petition and denied the custody complaint of the great-aunt, finding:

> For me the pre-eminent reasons for approving [T.J.'s] adoption, despite my confidence in his great-aunt's competence to provide him a warm and loving home, are [the adoptee]'s fierce attachment to [the foster mother], the wonders she has accomplished with him, her extraordinary parental abilities, and the serious risk that pulling [the adoptee] away from her will permanently scar his development.

The court concluded that, "[i]n my judgment these considerations, on balance, outweigh his parents['] wishes and the advantages to being raised by [the great-aunt] in the company of his extended family." In short the trial court found, by a preponderance of evidence, that the foster mother should prevail over the custodian chosen by the parents.

IV. Standard of Review

We review a trial court's order granting an adoption for abuse of discretion, and determine whether the trial court "exercised its discretion within the range of permissible alternatives, based on all the relevant factors and no improper factor." *In re Baby Boy C.*, 630 A.2d 670, 673 (D.C. 1993), *cert. denied*, 115 S. Ct. 58 (1994). In evaluating the trial court's exercise of discretion, we assess whether the court has applied the correct burden

of proof. *See Santosky v. Kramer*, 455 U.S. 745, 757 n.9 (1982); *Appeal of H.R.*, 581 A.2d 1141, 1182-83 (D.C. 1990). We then evaluate whether the trial court's decision is "supported by substantial reasoning drawn from a firm factual foundation in the record." *In re D.I.S.*, 494 A.2d 1316, 1323 (D.C. 1985).

V. Legal Analysis

This case presents the issue of what right, if any, a mother[4] (parent) retains, with respect to the selection of a custodian for her child, where: the mother's parental rights have not been terminated; she has not relinquished those rights; she is not mentally incompetent to plan for her child's future, but is unable by reason of her mental condition to take personal care of her child; and she has not been adjudicated as a mother who failed, voluntarily, to provide proper parental care. We have never had occasion to resolve this issue, although we have acknowledged its existence:

> [w]hen there are competing petitions for adoption, there is a complex, unresolved question whether the child's noncustodial mother, whose parental rights have not been terminated, *can dictate the result by consenting to adoption by one of the parties but not the other.*

In re Baby Girl D.S., 600 A.2d 71, 87 (D.C. 1991) (emphasis added). In dicta we suggested that the mother's

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[4] Our discussion applies, of course, to the right of natural parents with respect to the placement of their child. Here, the father consented to the custody request by the great-aunt, but has not otherwise played any role in the raising or decision-making relating to the child. The mother was the initial custodian of the child, and it is her role in this case that is central to this controversy. As a result, we will generally refer to the rights of the mother, with the understanding this is a handy reference which applies to natural parents in general.

choice could be overcome only by a very strong showing on the prospective adopter's part:

> if . . . the party who does not receive the mother's consent must prove by clear and convincing evidence that such consent is unreasonably withheld, in the best interest of the child, when that party seeks to adopt, this does not strike us an inappropriate burden.

Id. at 89.

We now take the step, not taken in *Baby Girl D.S.*, and hold that unless it is established that the parent is not competent to make such a decision, a child and the natural parents share a vital interest in preventing erroneous termination of their natural relationship, and, therefore, a parent's choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest. *See Santosky,* 455 U.S. at 760.

In reaching this conclusion, we emphasize that in this case the natural mother of the minor child, T.J., who is unable to care for him personally by reason of her mental condition, nevertheless has the capacity to designate a suitable and willing custodian and has done so. The trial court found the designated custodian, a family member, to be a strong, loving, dignified, highly moral, religious person, with significant experience raising her own children, and who had under her care and custody for ten years, T.J.'s sister, a well-adjusted twelve-year old who excelled in school. Under these circumstances, before rejecting the designated custodian's petition and severing the child's relation with his parent, sister, and other relatives in the context of a consolidated adoption proceeding, the trial court must find by clear and convincing evidence both that the custody arrangement chosen by the mother would clearly not be in the best interest of the child and that the parent's consent to adoption is with-

held contrary to the child's best interest.[5] *In re J.S.R.*, 374 A.2d 860, 864 (D.C. 1977).

The trial court erred in bifurcating two interrelated issues, disposing of the merits of the mother's retention of custody of the child herself as against the merits of the prospective adopter's claim, applying a clear and convincing standard, and then weighing the great-aunt's petition for custody against the petition for adoption applying the preponderance of the evidence standard. The major fallacy in this approach is that it gave far too little weight to the mother's right to choose the custodian for her child by applying an incorrect standard of proof to that consideration.[6] In short, the trial court erred in placing the mother's wishes on an equal footing with the other factors it considered.[7] The trial court effectively ruled that the mother's parental rights should be terminated when it determined that as between the mother and the prospective adopter, adoption was in the child's best interest and the mother's consent was withheld contrary to that interest. We have said that termination of parental rights is an extreme remedy. *In re L.L.*, 653 A.2d 873, 890 (D.C. 1995). Therefore, a ruling which effectively terminates parental rights, as this one did, must be supported by clear and convincing evidence. *J.R.S.*, *supra*, 374 A.2d at 864; *see also In re D.R.M.*, 570 A.2d 796, 804-05 (D.C. 1990).

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[5] Adoption has the legal effect of severing all rights and duties between the adoptee and his natural parents, their issue and collateral relatives. D.C. Code § 16-312(a) (1989).

[6] The availability of a suitable family member, willing to assume legal custody of the child, is an important consideration in the court's decision whether to terminate the parent-child relationship. *See In re Baby Girl D.S.*, 600 A.2d at 83-84.

[7] The trial court set forth eight considerations it weighed, including the wishes of the parents, in applying the best interest standard. Those considerations are set forth in a quote from the trial court's written opinion, *infra* at pp. 26-27.

The Supreme Court has recognized that natural parents have a "fundamental liberty interest in the care, custody, and management of their children" which is protected by the fourteenth amendment,[8] and gives parents the freedom to make personal choices in matters of family life. *Santosky*, 455 U.S. at 753.[9] Furthermore, natural parents do not lose this constitutionally protected interest "simply because they have not been model parents or have lost temporary custody of their child[ren] . . . . Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.* We have held that state intervention in the parent/child relationship is subject to constitutional oversight. *In re Baby Boy C.*, 630 A.2d at 673, and we have recognized that absent termination of parental rights or some other finding that the parents should no longer be permitted to influence the child's future, the parents' rights necessarily include the right to consent, or withhold consent, to the child's adoption. *Baby Girl D.S.*, 600 A.2d at 86 n.21; D.C. Code § 16-304 (1989) (consent to adoption); D.C. Code § 16-2361(b) (negating notice requirement of adoption statute once parental rights have been terminated). This right to consent must be guarded just as zealously as the Constitution guards the right of a natural parent to the cus-

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[8] Constitutional protections, applicable to the states through the fourteenth amendment, although not directly applicable to the District of Columbia, extend to the District through the due process clause of the fifth amendment. *Orange v. Bd. of Elections and Ethics*, 629 A.2d 575, 579 n.5 (D.C. 1993), citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[9] *See also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland Bd. of Educ.*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Education v. LeFleur*, 414 U.S. 632, 630-40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Pierce v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

tody and companionship of his or her child.[10] *See D.S. v. F.A.H.*, 684 S.W.2d 320, 323 (Ky. 1985) (court should consider any less drastic measure other than termination of parental right, to accomplish the child's best interest); *Davis v. Jurney*, 145 A.2d 846, 849 (D.C. 1958) (even though all considerations, including parents' rights, must yield to the child's best interest, application of that broad principle does not demand that the right of a parent should be ignored). *But see In re Violetta B.*, 568 N.E.2d 1345, 1352 (Ill. App. 1 Dist. 1991) (best interest of child is paramount even to parents' constitutional rights).

We find substantial further support for the conclusions we reach in *Freeman v. Chaplic*, 446 N.E.2d 1369 (Mass. 1983), which involved a custody conflict between the maternal step-grandmother, Freeman, and the paternal grand-parents, the Chaplics, for custody of a thirteen-year old girl, Lynn-Marie. The birth mother had consented to the Chaplics' custody petition and refused to consent to Freeman's petition. Focusing its inquiry on the mother's ability to care for the child, and the provisions that she made for those times when she was unable to do so, the court held that "[a]s a general matter, granting custody to a party opposed by the parents where neither the parents nor the parents' nominee is unfit or unsuitable . . . would raise serious constitutional difficulties." *Freeman*, 446 N.E.2d at 1375. The thirteen-year old child who was the subject of this custody conflict had been living with Freeman, with whom she had a close, loving relationship, in a custody arrangement precipitated by the mother's hospitalization because of a

[10] We do not speak here of situations where a parent withholds consent to an adoption, but has not devised any alternative plans for the permanent placement of the child. Nor are we addressing the standard to be applied in those circumstances where the parent has been found in a judicial proceeding to have abused the child. We are dealing only with the custody wishes of a parent who, through no fault of her own, is unable to care properly for her child.

nervous breakdown. After the Chaplics filed a petition for guardianship, to which both natural parents consented, they were appointed guardians with custody. The child adjusted well in the Chaplics' household, developing a warm relationship with her two siblings who were also in the Chaplics' custody.

The trial court, over the natural parents' objection, revoked the decree appointing the Chaplics guardians with custody, and appointed Freeman as custodian.[11] Among the trial court's findings were the following: (1) both the Chaplics and Freeman were fully capable of caring for Lynn-Marie; (2) the birth mother possessed the capacity to assent to the appointment of the Chaplics as guardians with custody of the child; (3) assent by the parents should be given little weight because the father has had little contact with the child, and the mother was suffering from emotional problems; (4) the parents' custody choice was designed to maintain the closest possible ties between the child and her parents, siblings, and paternal grandparents, the Chaplics; and (5) that the appointment of Freeman would serve the child's best interest. *Freeman,* 446 N.E.2d at 1372. On the basis of the last finding, the trial court vacated the appointment of the Chaplics and awarded Freeman custody.

The Supreme Judicial Court of Massachusetts reversed, holding that where the trial court found the parents fit and competent to make decisions about the child's future, and their choice of custodian was also suitable, the judge is bound to honor the parents' wishes, to the extent permitted by statute, on the choice of a custodian. Furthermore, "ties of affection which exist between a child and a person who has had custody of the child *must yield to the desires of the parents to raise the child in a fit environment.*" *Id.* at 1376 (emphasis added).

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[11] During the pendency of this action, the natural mother was adopted by the Chaplics and was living with them along with her other two children.

A Florida court has also recognized that the mother's custody choice must be given weighty consideration. In *Berhow v. Crow,* 423 So. 2d 371 (Fla. 1982), a teenage birth mother gave custody of her daughter to the Berhow family, who then became licensed foster parents in California where they were registered as the child's parents with the consent of the natural mother. Shortly thereafter, the natural mother died, and the Berhows petitioned to adopt the child with the consent of the birth father, in a California court. During the pendency of that proceeding, however, the maternal grandparents, under false pretense, removed the child from the Berhow home, took her to Florida, and adopted her there, without notifying the Berhows. Upon learning of the adoption, the Berhows moved to vacate the adoption order, but the trial court denied the motion on the ground that the Berhows lacked standing to challenge the adoption. The court of appeals reversed, holding that the Berhows, as the birth mother's choice of custodian, had "demonstrated a due process liberty interest in maintaining their close family relationship with [the child.]" *Berhow,* 423 So. 2d at 371. The Berhows, therefore, had standing to challenge the adoption and should have received notice of the adoption proceedings. *Id.* at 373. The court found dispositive the fact that the child had been placed with the Berhows for more than temporary care by the natural mother. *Id.*

Finally, a New York court granted an adoption to the mother's choice of custodian because the authorized agency providing foster care also supported the adoption. *In re Guardianship of the D. Children,* 576 N.Y.S.2d 136 (A.D. 1 Dept. 1991). The natural mother had voluntarily placed both her infant sons in foster care with a Mrs. Harding. Shortly thereafter, the natural mother died, the grandmother's custody petition was denied, and an appeal was taken. The appellate court held that the grandmother did not have precedence for custody over

the adoptive parents selected by the authorized agency.[12] *Id.; but see Worley v. Jackson,* 595 So. 2d 853 (Miss. 1992) (the parental choice must yield to the judge's determination of what is in the children's best interest, unless that determination is manifestly wrong); *In re Stephanie M.*, 867 P.2d 706 (Cal. 1994), *cert. denied,* 115 S. Ct. 277 (1994) (parent's choice of custodian not within the child's best interest).[13]

There was substantial evidence in this case that the mother was unable to care for the adoptee herself, and the trial court so found by clear and convincing evidence —a finding which we do not fault. There was no evidence, however, that the mother was incapable of making decisions about her son's future. To the contrary, there is considerable undisputed evidence in this record that the mother always ensured that someone would provide for the child's needs when she believed she was un-

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[12] The appellate court did not indicate how much weight, if any, was given to the mother's choice of custodian, although this may be because the mother's choice coincided with that of the authorized agency. But, even assuming the court did not rule on the basis of the mother's choice, that case nonetheless provides support for our holding in this case, because the court ruled on the basis of the choice made by the agency authorized to permanently place the children. In this case, both FLOC and DHS also favored the great-aunt as the custodian of the child.

[13] Both of these cases are factually distinguishable from this case: In *In re Stephanie M.*, the parents had physically abused the child and the court found that their choice of custodians, the maternal grandmother or, in the alternative, the aunt, would be unable to protect the child from further physical abuse by the parents. In *Worley v. Jackson*, the maternal grandparents who were the mother's choice sought temporary custody on grounds that they had *in loco parentis* status. The court found that no *in loco parentis* status existed, and awarded the paternal grandparents custody because, among other considerations, they sought to have permanent, as opposed to temporary custody, which was in the best interest of the children. Furthermore, the court found that such a custodial arrangement in no way impaired the mother's future parental rights.

able to do so herself. For example, in the neglect proceedings Judge Mize specifically found that:

> [t]he evidence demonstrates that actions were taken with forethought by the mother to assure that [the adoptee] was properly taken care of by another.[14]

The mother selected a suitable custodian, the child's great-aunt. The trial court described the great-aunt as an "extraordinary . . . strong, loving, dignified, highly moral, religious person" who has successfully raised eight of her own children. The trial court also found that the great-aunt has been raising the child's older sister for ten years, "with love, care and skill, [and the sister] is a well-adjusted 12 year-old, who excels in school and has a firm sense of herself." Finally, the great-aunt has a strong family-support network who "stand ready" to offer the child a home should anything happen to her.

It is significant, in our view, that there is no evidence that the mother made any decision harmful to the child, or that the trial court found that the great-aunt was in any way unfit or unsuitable to be his custodian. Granting the great-aunt custody of the child would strengthen the natural bonds of the family, permit the child to be raised with his sister, and preserve the relationship with his mother and other members of his extended family. On the other hand, granting the foster mother's adoption petition ignores the mother's constitutional rights to participate in decision-making relating to the rearing of her child without a formal finding that she has forfeited her right to do so. Granting the foster mother's adoption petition would also sever the child's connection with his blood relatives. In holding that the trial court here failed to properly take into account the mother's rightful role

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[14] Thus, the court adjudicated T.J. neglected under D.C. Code § 16-2301(9)(C), due to the mother's mental illness and not pursuant to § 16-2301(9)(B) because, "T.J. was not without proper care or control, subsistence, education . . . or other emotional health." *See supra*, note 1.

in her son's future, we endorse the observation of the Supreme Court in *Moore v. East Cleveland*, 431 U.S. 494, 505 (1977), which the Supreme Judicial Court of Massachusetts in *Freeman* also found weighty:

> Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfaction of a common home. Decisions concerning child rearing, which . . . have [been] recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Freeman, 446 N.E.2d at 1375 n.11.

Unless a child's parents have in some manner forfeited the right to direct the upbringing of their children, the parents have the right to determine what is in their child's best interest. *See Appeal of H.R.*, 581 A.2d at 1177 (Ferren, J.) ("It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, very probably more so, to the best interest of the child."), citing *In re Guardianship of Smith*, 265 P.2d 888, 891 (Cal. 1954) (en banc) (Traynor, J., concurring). That right includes the right to raise the child if physically or mentally able to do so, or, if not, the right to determine who should raise the child.[15] *Id.*

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[15] Thus, where the parent/child relationship is intact, a state may only intrude in that relationship in very limited circumstances in the public interest, or for the protection of the child. Normally, such intervention does not permanently sever the parent/child relationship. *See, e.g., In re A.C.*, 573 A.2d 1235, 1246-47 (D.C. 1990); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (citing *People v.*

Taking all of these considerations into account, we conclude, on the facts of this case, that the mother's choice of a suitable custodian and the household in which her son should be reared should have been accorded far greater weight by the trial court, and it was error for the court not to give effect to the mother's choice of custodian for her child absent a showing, by clear and convincing evidence, that the choice would be clearly contrary to the child's best interest. *See Freeman,* 446 N.E. 2d 1369; *Berhow,* 423 So. 2d 371; *In re Guardianship of the D. Children,* 576 N.Y.S.2d 137; *see also, D.S. v. F.A.H.,* 684 S.W.2d at 322 (where mother's inability to care for her child is neither self-imposed nor deliberate, placement with a family member must be considered prior to termination of parental rights).

We agree with the foster mother's observation that the child's best interest should be the determining factor for the trial court. The natural mother's views, however, at least under the circumstances presented here, must be taken into consideration in determining what is in the child's best interest. *See Appeal of H.R.,* 581 A.2d at 1177. Moreover, in this case the guardian *ad litem, i.e.,* the child's representative, DHS, and FLOC, the agency with legal custody of the child, all support the mother's choice of custodian. *See In re Guardianship of the D. Children,* 576 N.Y.S.2d at 137 (blood relative has no precedence for custody over adoptive parents selected by the authorized agency).

VI. Conclusion

Having held, on the facts of this case, that the parents' choice of custodian should have been accorded far greater weight, we turn now to a discussion of the applicable legal standard, mindful that the determination of what is in the child's best interest cannot be accomplished by

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Pierson, 68 N.E. 243 (N.Y. 1903) (the right to practice one's religion does not include liberty to expose the child to communicable diseases, ill health or death).

imposing formulas, doctrines, presumptions, or a rigid hierarchy of placement alternatives. *See In re D.G.*, 583 A.2d 160, 165 (D.C. 1990); *In re D.I.S.*, 494 A.2d at 1323; *Bazemore v. Davis*, 394 A.2d 1377, 1383 (D.C. 1978) (en banc). Before doing so, we note preliminarily that, contrary to the foster mother's contention, we do not understand the appellants' argument to be that the trial court should have elevated some other right or interest above the child's best interest. The issue is whether the trial court applied the correct evidentiary standard, and whether the trial court required the parties to bear the appropriate evidentiary burden, in weighing the factors that guide the best interest analysis.

In deciding between the competing petition of the foster mother and the great-aunt the court applied a preponderance of the evidence standard to determine the child's best interest, stating:

> The best interest standard calls upon the court to look at [the child's] life from many perspectives—[the child's] bonding or attachment with those who wish to bring him up; his parents wishes; the trauma he would face if moved from the [foster mother to the great-aunt's] care; how that move would affect his growth as a person; the difficulties and prejudices [the child] would be faced with as a result of a transracial lesbian adoption; the advantages and support offered by an extended family; the respective abilities of each side to give [the child] a real sense of his cultural, ethnic and biological heritage; as well as the potential of each to share their love and to give [the child] a real sense of himself.

For the court, the "pre-eminent reasons" for granting the foster mother's adoption petition, despite being confident that the great-aunt was a fit custodian, was the adoptee's attachment to the foster mother, the progress he made while in her care, and the risk of a permanent emotional scar if he were removed from her. Finally,

the court ruled that by a preponderance of the evidence, on balance, these considerations outweighed his parents' wishes and the advantages of being raised by his great-aunt in the company of his extended family.

We hold that the court erred in applying the preponderance of the evidence standard when weighing the foster mother's interest against the mother's right to preserve the relationship of parent and child and to exercise her choice of the great-aunt as custodian. If the mother had not sought to preserve the family relationship and had not come before the court supporting a suitable family member as custodian for the child, or if parental rights had been terminated, then the trial court would be correct in employing the preponderance standard in resolving the competing petitions of the foster mother and the great-aunt. *In re D.I.S.*, 494 A.2d at 1325-26. However, this is not simply a case of competing petitions for adoption between unrelated parties. It is a case between a natural mother, who seeks to preserve the relationship of parent to child, and who designated a suitable custodian to care for her child, and an unrelated party who seeks to adopt him.

Where the parent(s) have unequivocally exercised their right to designate a custodian, *i.e.*, made their own determination of what is in the child's best interest, the court can "terminate" the parent(s)' right to choose only if the court finds by clear and convincing evidence that the placement selected by the parent is clearly not in the child's best interest, and the consent to adoption has been withheld by the parent contrary to the child's best interest. The non-parent seeking adoption must carry that burden of proof.[16]

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[16] The application of the preponderance of the evidence standard in *D.I.S., supra*, 494 A.2d at 1316, a case where there were competing petitions for adoption by two non-parents, is inapposite under the facts of this case. In *D.I.S.*, the court distinguished the case from *J.S.R., supra*, 374 A.2d at 864 where we applied the clear and convincing standard, observing that the issue in *J.S.R.* was

Applying these considerations to the facts presented here, we conclude that the foster mother failed to show by clear and convincing evidence [17] that the mother's custody choice was clearly not in the adoptee's best interest. There is overwhelming record support for the court's finding that the great-aunt would be a fit custodian. Moreover, custody with the great-aunt would ensure that T.J. would be in the company of his cousins and sister. With respect to those relationships the trial court found that T.J. enjoys the company of his cousins and is very attached to his sister. The mental health experts who testified were divided on the issue of the extent and degree of harmful consequence to the child if there was a change of placement.

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whether a natural parent, who has a constitutionally protected interest in raising his own child, is withholding consent to the adoption contrary to the child's best interest. In *D.I.S.*, the mother was deceased and the father consented to one of the competing petitions. Thus, the father did not seek to preserve, as the mother does in this case, the parent-child relationship; he was willing to have that relationship terminated in favor of one of the competing non-parents. The circumstances are quite different where a mentally or physically disabled parent is seeking to preserve the parent-child and family relationship through the support of a custodial plan for his or her child's care as set forth in a petition for custody which is being considered along with a petition for adoption filed by an unrelated person. For the reasons previously stated, the higher clear and convincing standard must apply because of the parent's protected interest in determining the unbringing of his or her child, and because the issues concern the termination of those rights.

[17] A preponderance of the evidence is "proof which leads the [fact finder] to find that the existence of the contested fact is more plausible than its non-existence." *In re D.I.S.*, 494 A.2d at 1326 (quoting MCCORMICK ON EVIDENCE § 339 (E. Clearly 3d ed. 1984)). The standard of clear and convincing proof requires evidence that will "produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *District of Columbia v. Hudson*, 404 A.2d 175, 179 n.7 (D.C. 1979) (en banc) (citation omitted).

Placing particular emphasis on the adoptee's attachment to the foster mother,[18] the trial court concluded that the evidence "on balance" favored granting the foster mother's adoption petition. If the mother had expressed no preference, that ruling, on this record, may well have been within the acceptable range of the court's exercise of discretion. *See In re Baby Girl D.S.*, 600 A.2d at 82. The trial court, however, did not find, and we think from this record, could not find, by clear and convincing evidence, that placement of the child with the great-aunt would be clearly contrary to the child's best interest.[19] Indeed, the trial court found as fact that the great-aunt was a highly moral and dignified person, with significant experience raising her own children, and who was raising T.J.'s sister, a well-adjusted twelve-year old.

For all of these reasons we conclude that the trial court erred in rejecting the custodial arrangement selected by the mother. In so concluding, we echo the sentiment expressed in T.J.'s brief:

> T.J. has a family . . . that is supportive, that loves him and is willing and able to care for him. In this country, it still means something to have a family with which one shares biological and cultural identity where a child can grow up.

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[18] We do not minimize the significance of this consideration. As we emphasized in *In re L.L.*, 653 A.2d at 684-86, the governing statute requires that the trial court give weight to the child's need for continuity of care, the emotional needs of the child, and the child's attachment to the foster mother. See D.C. Code § 16-2353(b) (1989). The same statute, however, requires the trial court to consider the child's interaction with others including parents and siblings. As noted in the text the great-aunt has raised T.J.'s sister for ten years and, as the trial court found, T.J. is "very attached" to the sister.

[19] The trial judge's opinion evidences the strength of the competing considerations in his mind and his difficulty of decision. As we read his opinion, he invoked the preponderance standard, but would have himself ruled differently under the clear and convincing test we today hold applicable.

See also In re D.I.S., 494 A.2d at 1324 (under similar circumstances, the trial court granted grandmother's adoption petition "because of the extensive support group of relatives available to assist the grandmother").

VII. Our Resolution of This Appeal

The judgment granting the foster mother's adoption petition is therefore reversed, and the case remanded to the trial court to vacate the orders granting adoption and denying custody, and to enter an order granting custody to the child's great-aunt.[20] See *In re L.L., supra,* 653 A.2d at 889-90.

Reversed and remanded.

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[20] This conclusion is reached with the recognition that an initial order for child custody is always open to modification by the court where warranted by a change of circumstances affecting the child's best interest.

[Filed Jan. 10, 1994]

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION

No. DR-1366-93C

MARY DAVIS

v.

COLLEEN JONES

N-0268-91

IN THE MATTER OF TONY LEE JONES

A-302-92

IN THE MATTER OF THE PETITION OF MARY HYNES

INTRODUCTION

These are consolidated neglect, custody, and adoption cases all involving the same four year old African-American boy, Tony Jones. He entered the neglect system in April 1991 when his mother Colleen Jones, overwhelmed by her schizophrenia, no longer was able to care for him. (His father, Damen Lowe, has not been involved in his upbringing). After about a year's stay at St. Ann's Infant Home, Tony, in March 1992, was placed in foster care with Mary Hynes and her partner Janet Simons. There he stayed, prospered, and still stays.

When DHS was rumored to be considering moving Tony from foster care to live with his great-aunt, Mary Davis, a kind and loving 60 year old woman who has raised eight of her own children and is raising Tony's 12 year old half-sister Angela, Mary Hynes decided to file for adoption. These consolidated cases, then, pit Tony's extended African-American family as well as the District of Columbia, all of whom favor the custody petition of Mary Davis, against the women who have cared for Tony the last year and a half, and more particularly against Mary Hynes, a white lesbian who is seeking to adopt him.

The Court, of course, must reach a decision that, to its lights is "best" for Tony. I am painfully aware of the admonition one of the witnesses, a psychiatrist, Dr. James Egan, that this will be the most important decision of Tony's life. The decision is harder still knowing it will bitterly disappoint those who greatly love Tony, and who would raise him, had they the opportunity, with care and love. To those I disappoint I can only offer my deeply-felt regrets—I know they do not deserve this decision—and urge them to shower Tony with all the love my decision allows and their hearts hold. I have not so much ruled against them as for Mary Hynes. I think it best for Tony to grant the adoption petition.

Findings of Fact

Tony Jones was born on September 15, 1989 to Colleen Jones, a woman who then as now suffers from a serious schizo-affective disorder which renders it unlikely that she will ever be able to care for him, and to Damen Lowe, his father, who has never been a factor in his life or evinced any interest in raising him.

In infancy, Tony's mother valiantly struggled to care for him, but her schizophrenia left her prone to episodes of impaired judgment, depression, violence, and despair. From time to time, when feeling overwhelmed by her

responsibility for Tony, Colleen Jones would seek help from the Department of Human Services. (DHS was already familiar with Ms. Jones' problems having years before placed Tony's older half-sister Angela with Mary Davis, their maternal great-aunt.) These informal interventions usually resulted in DHS temporarily placing Tony with Mary Davis. Typically though, in a matter of days, Ms. Jones would demand his return, demands sometimes accompanied by outbursts of violence directed at Mary Davis or her home. These actions were sufficiently bothersome that when a neglect petition was finally filed, Ms. Davis declined to take Tony, not having received Colleen Jones' assurances that she willingly consented to the placement.

Tony's hectic infancy had its impact. He was extremely physically aggressive, speech delayed to the point of being near mute, far behind in learning skills, and subject to tantrums at the slightest provocation. Nevertheless, Tony's mother had given him sufficient care and affection that despite his many impairments, Tony still managed to retain a latent ability that in time would enable him to form a meaningful attachment.

On April 17, 1991, the various informal means of assistance having failed, Tony's case was petitioned. He was placed in shelter care at St. Ann's no relatives having stepped forward.[1]

During his year at St. Ann's, Tony made little progress. His behavioral and learning problems continued with scant improvement despite speech, language, and play therapy arranged through Howard University and the National Children's Center. Visits at St. Ann's from Tony's extended family were minimal and on March 26, 1992 Tony was placed in foster care with Mary Hynes and her partner Janet Simons.

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[1] On January 23, 1992, after trial, Judge Gregory Mize found Tony neglected pursuant to D.C. Code 16-2301 (9) (c) due to Ms. Jones' mental illness. He was committed to DHS March 31, 1992.

Ms. Hynes, who is 30 years old, and Ms. Simons, 49 years old, met seven and one-half years ago through their work at the Children's Defense Fund. They are both professionals—Ms. Hynes, a lawyer, Ms. Simons a sociologist—and through their work and volunteer activities have dealt extensively with childrens' issues. They have lived together for the past five and one-half years, currently in a comfortable single family home in Takoma Park, Maryland. The neighborhood is multi-racial, multicultural and middle class. Tony has his own room as well as a recreation room, den, and yard in which to play.

In the year and a half Ms. Hynes and Ms. Simons have cared for Tony he has blossomed into a talkative, happy, smiling little boy. For this his foster parents and especially Mary Hynes deserve great credit. No one disputes that they have done a remarkable job. From a boy whose vocabulary barely was a few words, he has turned into an affectionate chatterbox. His grasp of knowledge is about where it should be for a four year old and he no longer flies off the handle. Tony runs, bikes, swims, plays soccer, and generally does what little boys do. He attends an interracial kindergarten and church and has lots of friends of assorted races and colors. In short, Tony is a surprisingly happy, active, normal (although still at risk) little boy, fully integrated into his foster family, neighborhood, school and community. Bette Brooks, a clinical social worker who started working with Tony while he was at St. Ann's and has continued with him in foster care, has seen him progress from an aggressive, disruptive, troubled child, to a little boy who has a sense of trust and security in the world. She attributes that sense of comfort to the consistent nurturing and love Ms. Hynes gave Tony. They are an "especially . . . good match." (Tr. 475)

Mary Davis, Tony's great-aunt, is also an extraordinary person. She is a strong, loving, dignified, highly moral, religious person. Although without much schooling her-

self Ms. Davis has a keen sense of the importance of education. All eight of her children completed high school, and have been raised by her with love, discipline, nurturing, and a strong sense of traditional values.

In addition to successfully raising her own eight children, Ms. Davis has also been raising Tony's half-sister, Angela, for the past ten years. Again, she has done this with love, care and skill. Angela is a well-adjusted 12 year old who excels in school and has a firm sense of herself.

Ms. Davis lives in a single family home with a fenced in backyard in the Mount Pleasant area of the District of Columbia. Her household is a hub of activity for her children and grandchildren. Two of her adult sons live at home as does Tony's half-sister Angela. Ms. Davis' other children are welcome whenever they wish to stop by. Her daughter, Robin Lyons, a management specialist at Walter Reed, frequently drops off her two children, three year old Kelvin and ten year old Keisa, on her way to work. Tony knows his cousins and enjoys their company. He is very attached to his half-sister Angela who he regularly sees on his every other weekend visits with Mary Davis. Robin Lyons is firmly committed to assist her mother, Mary Davis, with whatever may be needed to raise Tony. Ms. Lyons and her husband (who plans to retire soon from the military) have recently moved to a comfortable, large house in Prince Georges County, Maryland. They stand ready to offer Tony a home should anything happen to Mary Davis.

Analysis

Legal Framework

In resolving these consolidated cases the Court must look to what is "best" for Tony. *His* interests must be the basis for decision whether we consider the neglect case, the custody case or the adoption case. See e.g., *Petition of D.I.S.*, 494 A.2d 1316 (D.C. App. 1985).

To the extent these cases are a contest between Ms. Davis and Ms. Hynes neither enjoys a presumption that she should prevail. What is best for Tony is to be decided by a preponderance of the evidence. And although they stand on an equal footing in terms of their evidentiary burdens Mary Davis as the choice of Tony's parents and as a close family member obviously has weighty considerations in her favor. To the extent the cases are a contest between Tony's mother and father, Colleen Jones and Damen Lowe, against Mary Hynes, Ms. Hynes' evidentiary burden is higher. She must convince the court by clear and convincing evidence that the parents opposition to the adoption is contrary to Tony's best interests. *Petition of D.I.S.*, 494 A.2d 1316, 1326 (D.C. App. 1985). However given Ms. Jones' bleak prospects of recovery from her schizoaffective disorder and Mr. Lowe's lack of interest in assuming parental responsibilities, there is no real possibility of either biological parent raising Tony. Their wishes, as noted earlier, are nonetheless important considerations in deciding whether Mary Davis should have custody or Mary Hynes should be allowed to adopt.

The best interests standard calls upon the Court to look at Tony's life from many perspectives—Tony's bonding or attachment with those who wish to bring him up; his parents wishes; the trauma he would face if moved from Mary Hynes to Mary Davis' care; how that move would affect his growth as a person; the difficulties and prejudices Tony would be faced with as a result of a transracial lesbian adoption; the advantages and support offered by an extended family; the respective abilities of each side to give Tony a real sense of his cultural, ethnic and biological heritage; as well as the potential of each to share their love and to give Tony a real sense of himself. See generally *Petition of D.I.S.*, supra; D.C. Code Section 16-2353(b).

For me the pre-eminent reasons for approving Tony's adoption, despite my confidence in his great-aunt's com-

petence to provide him a warm and loving home, are Tony's fierce attachment to Mary Hynes, the wonders she has accomplished with him, her extraordinary parental abilities, and the serious risk that pulling Tony away from her will permanently scar his development. In my judgment these considerations, on balance, outweigh his parents' wishes and the advantages to being raised by Mary Davis in the company of his extended family.

I have already summarized the great strides, beyond any dispute, that Tony has made in Mary Hynes' care. His attachment to her is intense and unique, as is hers to him. She has been a superb mother for him and I have no doubt that Tony will receive that same level of exceptional care in the future.

Moreover, Ms. Hynes is acutely aware of the racial and gender child development issues that will dog Tony's life with her, and is prepared to help him meet those difficulties. She is consciously and actively providing him an ethnically and culturally diverse upbringing. Tony's friends and those of Ms. Hynes and Ms. Simons—at home, in school, in church, and at play and leisure—cover a range of nationalities and races. I am confident that Mary Hynes will offer Tony a richly diverse life, that he will grow up with a firm sense of himself and of his worth, and with a clear understanding of his family, gender, racial, and cultural identity. Ms. Hynes has expresed her willingness to let Tony regularly visit with his extended family. She is also open to Tony's sister and cousins visiting with him. I believe Ms. Hynes is serious in these commitments, realizes that they are in Tony's best interest, that they will facilitate Tony's knowledge of and love for his first family, and with that of his racial and cultural identity.

In Dr. Egan's view, which I find persuasive, as long as Mary Hynes has a genuine regard, for and appreciation of Tony as an African-American he will achieve a sense of himself as a black American. While other

witnesses differed with Dr. Egan as to how great a blow it would be for Tony to grow up apart from his extended family, I am persuaded by Dr. Egan's review of the literature that the experience with trans-racial adoption has been quite favorable, and that critical to the success of an adoption is the quality of the adoption, not the race of the parties.

Much the same can be said of gender issues. Again what is important is that the child grow up in a home that respects and values who he is. Mary Hynes does just that. She loves Tony for himself. She is not pushing some political or ideological agenda of child rearing.[2]

To be sure Tony would have a clearer sense of his racial, cultural, and family identity if he were brought up by Mary Davis in the same household as his sister, and with the constant informal comings and goings of his cousins, aunts and uncles. I do not underestimate the importance to Tony of fully participating in that experience. Regular visits arranged by and through Mary Hynes can never adequately substitute for living every day with his extended family.

Nevertheless, in my judgment, that loss of daily contact with Tony's immediate family is outweighed by the real and substantial risk of harm should he be removed from Mary Hynes' care. Again, the experts differed regarding Tony's adaptability at this point in his life. To simplify somewhat, those favoring Mary Davis' custody petition essentially took the view that Tony adapted before so he can adapt again. Those favoring Mary Hynes' adoption petition pointed to the importance of his attachments and the limits of his resiliency. While no one has a crystal ball I found Dr. James Egan's views and analysis most informative and persuasive.

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[2] Perhaps unsurprisingly children of lesbian parents tend to grow up more tolerant than other children. Studies show that gay and lesbian couples do not produce, deviant, disturbed or impaired children.

Essentially, for a child's successful development, race, gender, extended family, and all else is subservient to the fundamental importance of forming an attachment very early on to a person who is viewed as fundamentally different from all others and irreplaceable. When that fails to happen, when that attachment is not fixed, or if fixed, is disrupted, the child has truly serious difficulties developing into a caring, loving, human being.

Whether severing a particular attachment will merely result in yet another scar among many, or instead decisively and devastatingly truncate the child's development, is beyond easy prediction. It seems apparent, however, that the fragility and tentativeness of early attachments puts a child at risk of more serious consequences with each subsequent interruption. Dr. Egan used the analogy of adhesive tape to explain the concept. Tape can be pulled off just so many times before it loses all adhesive capacity.

Tony has not had an easy four years. That he is doing as well as he is, is, in Dr. Egan's words "a triumph for him and for those who have cared for him, but it's a fragile triumph." (Tr. Nov. 22 at 28). Moving now, even to a home as caring as Mary Davis', would be a disaster because of the very real risk that in destroying his trusting attachment to Mary Hynes, Tony will be unable to trust anyone.

That to me is the crux of these cases. Against long odds Tony has succeeded in establishing a son/mother attachment with Mary Hynes. That bond should not be severed.

For these reasons I find by clear and convincing evidence that Colleen Jones and Damen Lowe's consent to adoption has been withheld contrary to the best interests of Tony Jones and that by a preponderance of the evidence it is in the best interest of Tony Jones to grant Mary Hynes' adoption petition rather than Mary Davis' custody petition.

Accordingly, it is this 7th day of January 1994,

ORDERED that the adoption petition of Mary Hynes is GRANTED;

And it is FURTHER ORDERED, that the custody petition of Mary Davis is DENIED;

And it is FURTHER ORDERED, that Case No. N-268-91 remain open pending the expiration of the time to appeal this decision, and if an appeal is taken, until disposition of the appeal.

/s/ Stephen F. Eilperin
STEPHEN F. EILPERIN
Judge

[Filed Apr. 17, 1996]

DISTRICT OF COLUMBIA COURT OF APPEALS

N268-91

Nos. 94-FS-140 and 94-FS-274

IN RE: T.J., M.D. & C.J.,
Appellants.

No. 94-FS-277

IN RE: M.H., T.J.,
Appellant.

BEFORE: Wagner,* Chief Judge; Ferren, Terry, Steadman,* Schwelb, Farrell, King,* Ruiz,** and Reid, Associate Judges.

ORDER

On consideration of the petition of appellee, M.H., for rehearing and rehearing en banc, the opposition and responses thereto, the motion of Mattie Giles to file amicus curiae brief supporting petition, the lodged brief, the motion of appellants for leave to late file opposition to motion to file amicus curiae brief, and the lodged opposition, it is

ORDERED by the merits division * that the petition for rehearing is denied. It is

FURTHER ORDERED that the motion of Mattie Giles to file amicus curiae brief supporting petition and the motion of appellants for leave to late file opposition to motion to file amicus curiae brief are granted and the

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** Associate Judge Ruiz has recused herself from these cases.

Clerk is directed to file the lodged brief of amicus curiae and the lodged opposition to the motion; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

On Petition for Rehearing En Banc

Statement of FERREN, *Associate Judge*, dissenting from denial of the petition for rehearing en banc:

The division in this case has ruled:

> We now . . . hold that unless it is established that the parent is not competent to make such a decision, a child and the natural parents share a vital interest in preventing erroneous termination of their natural relationship, and, therefore, a parent's choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest.

In re T.J., M.D., & C.J., 666 A.2d 1, 11 (D.C. 1995) (citation omitted). My quarrel is not with this rule of law. Nor am I sure that an injustice would result from the division's disposition. But I believe the divison seriously errs in presuming to apply its new rule of law to an old record.

The division not only reverses T.J.'s adoption by the foster mother but also remands the case for entry of an order granting custody to the child's great aunt. Absent trial court findings of fact under the newly adopted clear and convincing evidence standard, this court should not itself award custody. That order not only requires improper appellate court fact-finding, as Judge SCHWELB points out, but also results in an imprudent appellate court disposition based on a stale record. It is one thing to affirm trial court findings as of the time they are made or to remand for new findings which, in a case like this, presumably would take into account evidence of changed circumstances since the earlier ruling. It is quite another thing for an appellate court to apply a newly-announced rule of law to its own findings of fact based on a record

dated years earlier, and then to order a change of custody. For all the division knows, the trial judge on remand—reviewing past and present facts after hearing from the parties and material witnesses—might see the matter differently even when the new rule of law is applied. Rather than presume to know what is in the child's best interest at this time, the division should have remanded for the trial court to reopen the record and apply the law of this case as all the facts now warrant. After all, a child's life is at stake, and one would think that any change of custody should occur only after the most current information is considered.

I had hoped the division would revise its opinion by granting the petition for rehearing, since this is not the kind of routine correction the en banc court is normally convened to address. But the division has voted not to rehear. Because I am concerned about the impact on all concerned of an immediate change of custody without an updated review of the facts that conceivably could affect the result, I would have the en banc court rehear the case in the hope of obtaining a more principled disposition.

I recognize the importance of finality. Presumably, the division hoped to achieve that result here rather than remanding for new findings that might lead to still another appeal and continued uncertainty. But in doing so the division acted both as lawmaker and as fact-finder—without all the facts. When this court announces a rule of law different from the one employed by the trial court, it is sometimes possible for this court to say that, even under the new rule, the result must be such-and-such, as a matter of law, on this record. But that presupposes a static record. In this kind of case, the record can change significantly over time, and thus it is important that the correct rule of law be applied to a current, not an old, record. This the division did not—indeed, it could not —do.

The division, however, ended its opinion with footnote 20:

> This conclusion is reached with the recognition that an initial order for child custody is always open to modification by the court where warranted by a change of circumstances affecting the child's best interest.

Id. at 17 n.20. I take this to mean that on proper motion the parties and the trial court effectively can interdict this court's order for an immediate change of custody by reopening the record to reexamine whether a change of custody would be appropriate. If I am correct in this interpretation of the court's order, it would have saved everyone concerned a good deal of anxiety, as well as considerable time and effort, if the division had said so directly—or, better still, had announced its new clear and convincing evidence standard and then simply remanded for the trial court to apply it.

Statement of SCHWELB, *Associate Judge*, dissenting from the denial of the petition for rehearing en banc:

I.

The trial judge gave this difficult, case balanced, thoughtful and sensitive consideration. He recognized that there was much to be said on both sides of the controversy, and he effectively articulated the strengths and weaknesses of the respective parties' positions. In the end, however, he concluded that the foster mother's petition to adopt T.J. should be granted because a contrary disposition would create an unacceptable risk of serious harm to the boy. The judge explained that

> [f]or me, the pre-eminent reasons for approving [T.J.'s] adoption, despite my confidence in his great-aunt's competence to provide him a warm and loving home, are [T.J.'s] fierce attachment to [the foster mother], the wonders she has accomplished with him, her extraordinary parental abilities, and *the serious risk that pulling [T.J.] away from her will permanently scar his development.*

(Emphasis added).

With respect to the expert testimony, the trial judge, who heard the witnesses and had the opportunity to assess their evidence first-hand, found Dr. James Egan's views and analysis to be the "most informative and persuasive." In conformity with Dr. Egan's testimony, the judge found as follows:

> Essentially, for a child's successful development, race, gender, extended family, and all else is subservient to the fundamental importance of forming an attachment very early on to a person who is viewed as fundamentally different from all others and irreplaceable. When that fails to happen, when the attachment is not fixed, of if fixed, is disrupted, the child has truly serious difficulties developing into a caring, loving, human being . . . .

> [T.J.] has not had an easy four years. That he is doing as well as he is, is, in Dr. Egan's words, "a triumph for him and for those who have cared for him, but it's a fragile triumph." Moving now, even to a home as caring as [the great aunt's], *would be a disaster* because of the very real risk that in destroying his trusting attachment to [the foster mother] [T.J.] will be unable to trust anyone.
>
> That to me is the crux of these cases. Against long odds [T.J.] has succeeded in establishing a son/mother attachment with [the foster mother]. That bond should not be severed.

(Emphasis added).

Any fair-minded reader of the judge's opinion would, I think, agree that it was written after full reflection on the difficult issues at hand. The judge did not exaggerate or overstate. He chose his words carefully. I am quite sure that when the judge used the word "disaster," he meant exactly that.

II.

In spite of the trial judge's finding that removal would create a serious risk of permanently scarring T.J.'s development, the division has directed the judge to take the very step which he has described as courting disaster. The division has not held, nor could it rationally hold, that the judge's evidentiary finding that removal would be disastrous is clearly erroneous, for there was ample expert evidence to support it.[1] The effect of the division's opinion is therefore to order that T.J. be moved out of his home *notwithstanding the judge's finding that such a step would create an unacceptable risk of serious harm.*

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[1] The division does make an appellate finding of fact that the foster mother failed to make the necessary showing by clear and convincing evidence. In my opinion, it is the trial judge's job, and not the appellate court's, to make such findings.

The division has held that the judge erred in applying the "preponderance of the evidence" standard to the question whether it was in T.J.'s best interest to be adopted by the foster mother. According to the division, a "clear and convincing" evidence standard should have been applied instead. Assuming, *arguendo*, that the division's position as to the required level of proof is correct, the appropriate remedy would be to remand the case to the trial judge with directions to reconsider the record under the clear and convincing evidence standard.[2] Telling the judge to issue an order which, as he has expressly found, would court disaster and risk serious harm to the child is not, in my opinion, an acceptable option.[3]

III.

Rehearing en banc is appropriate only "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." D.C. App. R. 40(e). I believe that each of these criteria has been satisfied in this case.

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[2] Because the judge explicitly found by clear and convincing evidence that the biological parents' consent to T.J.'s adoption had been withheld contrary to T.J.'s best interests, and because he believed that moving T.J. out of his home would be a disaster, I question whether his application of the allegedly wrong standard affected his ultimate disposition.

[3] I acknowledge, however, that footnote 20 to the division's opinion, 666 A.2d at 17, tempers the rigor of the holding. The trial judge will presumably have to decide, in conformity with that footnote, whether the additional time which T.J. has remained in the foster mother's home since the trial represents a new and material change of circumstances. T.J. is now more than six and a half years old, and has lived in the foster mother's home for more than four years. Even assuming, as the division suggests, that no impartial trier of fact could reasonably have ruled for the foster mother at the time of the trial if the clear and convincing evidence standard had been utilized, there have now been two more years of bonding since that time.

We have repeatedly held that where a child's future placement is at issue, the court must act as *parens patriae* in the child's best interest, and must not expose him to serious risk of harm. *See, e.g., In re L.L.*, 653 A.2d 873, 886-87 (D.C. 1995); *In re L.W.*, 613 A.2d 350, 354-55 (D.C. 1992). "Courts will not gamble with a child's future." *L.L., supra,* 653 A.2d at 887 (quoting *In re Interest of P.M.C.*, 437 N.W.2d 786, 792 (Neb. 1989)).[4] We have insisted that judges "monitor the situation carefully and promptly take steps to protect [the child] if [his] physical or emotional welfare is endangered." *In re S.C.M.*, 653 A.2d 398, 406 n.12 (D.C. 1995). Each case is, of course, different, but ordering the removal of T.J. from his home notwithstanding a finding that such a move would be a disaster for him cannot be reconciled with the fundamental reasoning which underlies the cited authorities, as well as many others.

Moreover, the trial judge's decision was consistent not only with Dr. Egan' testimony, but also with our past jurisprudence. We have recognized that it would be "ruthless beyond description to take a child out of a loving home, when [he] has lived at that home for a substantial period of time as a result of [his] biological parents' inability or unwillingness to care for [him]." *L.L., supra,* 653 A.2d at 883 (quoting *In re: Hazel Wood's Adoption,* 29 A.2d 88, 90 (Pa. 1942)); *see also* authorities cited *id.* at 883-84. In light of the trial judge's evidentiary findings and the expert testimony on which they were based, the removal of T.J. from the foster mother's home would likewise be unfair to him. In my judgment, the division's disposition therefore imperils the uniformity

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[4] In *L.L. supra,* we went so far as to set aside a trial judge's decision where, in our view, the judge's disposition would have exposed the child to an unacceptably high risk to his physical and emotional well-being. In the present case, in which the judge has acted to protect the child from harm, this court should not interfere.

of our decisions within the meaning of D.C. App. R. 40(e)(1).

This appeal also raises a question of exceptional importance. *See* Rule 40(e)(2). The case is important not only to T.J., whose future and well-being have been placed at risk, but also to innumerable other children whose interests may be jeopardized by a precedent of the kind which the division's opinion sets in this case. Never before, to the best of my knowledge, have we ordained, by appellate *fiat*, a disposition which, according to the well-supported evidentiary findings of the judge who heard the case, would threaten disaster to the child in whose interest the court is supposed to be acting.

The full court should look long and hard at a division opinion creating such a precedent. Accordingly, I respectfully dissent from the denial of the foster mother's petition for rehearing en banc.

Supreme Court, U.S.
FILED
MAY 28 1996
CLERK

(2)

No. 95-1734

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

M.H., Petitioner

v.

T.J., M.D., and C.J., Respondents

RESPONDENT M.D.'S MOTION TO PROCEED IN FORMA PAUPERIS

M.D., Respondent, through undersigned counsel, moves this Court for an order permitting her to participate in this proceeding without payment of fees and costs and without giving security. As reasons M.D. relies upon her Affidavit which is submitted with this Motion.

Respectfully submitted,

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202-546-1424
Court Appointed Counsel for
M.D., Respondent

23pp

No. 95-1734

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

M.H., Petitioner

v.

T.J., M.D., and C.J., Respondents

CERTIFICATE OF SERVICE

I, Harvey Schweitzer, a member of the Bar of this Court, hereby certify that on the 28th day of May, 1996, copies of Respondent M.D.'s Motion to Proceed In Forma Pauperis and Affidavit were mailed postage prepaid first class to:

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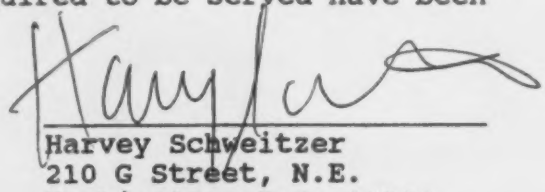
I further certify that all parties required to be served have been served.



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No. 95-1734

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

M.H., Petitioner

v.

T.J., M.D., and C.J., Respondents

RESPONDENT M.D.'S AFFIDAVIT IN SUPPORT OF HER MOTION TO PROCEED IN FORMA PAUPERIS

I, Mary Davis, do now state and affirm that I am a respondent in the above-entitled case; that in support of my Motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this proceeding or to give security therefor; that I believe that I am entitled to participate in this proceeding and that I desire to oppose the Petition for a Writ of Certiorari, and if such Petition should be granted I wish to file briefs and other motions as my interests might require.

I further affirm and state that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of this proceeding are true.

1. Are you currently employed?

Answer: No. I am disabled. I cannot remember my last employment or salary.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: Yes. I receive Supplemental Security Income (SSI) of about $470.00 a month.

3. Do you own any cash or checking or savings accounts?

Answer: No.

4. Do you own any real estate, stocks, bonds, note, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to that person.

Answer: I care for a minor child, Angela, the sister of Respondent T.J. This child receives Aid to Families with Dependent Children (AFDC) payments.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on May 23, 1996.

X Mary L Davis

Mary Davis

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

No. 95-1734

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

M.H., Petitioner

v.

T.J., M.D., AND C.J., Respondents

Harvey Schweitzer
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COURTER-STATEMENT OF THE QUESTION PRESENTED

Whether, in a consolidated proceeding to grant either a custody complaint consented to by competent parents or an adoption petition opposed by the parents, a highly suitable custody complainant is entitled by reason of parental choice to prevail, absent clear and convincing evidence that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-1734

M.H., Petitioner

v.

T.J., M.D., AND C.J., Respondents

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The decision under review incorporates into the best interest of the child standard the constitutionally-recognized rights of parents to designate custodians of their child. When parents seek, as they do in this case, to preserve a child in a family against a person seeking to destroy that child's family relationships, the parents' choice has legal significance that should not be set aside, except by clear and convincing evidence establishing that preservation of the parent-child relationship and the proposed family placement is not in the child's best interest.

The decision under review is quite limited in its scope, because the Court of Appeals carefully crafted its decision to restrict the breadth of its ruling. Petitioners seriously misstate the meaning and reach of the decision, which is quite narrow and carefully limited to the facts of this case. The District of Columbia Court of Appeals expressly tailored its holding in several ways:

> This case presents the issue of what right, if any, a mother (parent) retains, with respect to the selection of a custodian for her child, where: the mother's parental rights have not been terminated; she has not relinquished those rights; she is not mentally incompetent to plan for her child's future, but is unable by reason of her mental condition to take personal care of her child; and she has not been adjudicated as a mother who failed, voluntarily, to provide proper parental care. [Footnote omitted.]

Petitioner's.Appendix, 15a.

If that did not narrow the scope of its decision enough, the Court of Appeals went on to further limit it:

> We do not speak here of situations where a parent withholds consent to an adoption, but has not devised any alternative plans for the permanent placement of the child. Nor are we addressing the standard to be applied in those circumstances where the parent has been found in a judicial proceeding to have abused the child. We are dealing only with the custody wishes of a parent who, through no fault of her own, is unable to care properly for her child.

Pet.App., at 19a, f10.

Here, custody of T.J. was desired by the mother's aunt, who had cared for him in the past and who was caring for his twelve-year-old sister. Custody of T.J. was also desired by his foster mother, M.H., who had cared for him under contract as a non-adoptive foster mother.

This custody controversy followed upon judicial intervention in T.J.'s life. It became clear that T.J.'s mother was not able to provide continuous care for him, and a neglect proceeding was initiated. A judicial proceeding established that T.J. was a neglected child, based solely on his mother's mental incapacity.

When T.J. was initially taken into government care, pursuant to the neglect petition, he was placed by the Department of Human Services in an institutional infant home, where he remained until the neglect adjudication. Shortly after T.J. was adjudicated neglected, the Department of Human Services contracted with "For Love of Children" (FLOC), a private foster care agency. M.H. was one of those foster care providers licensed and under contract with FLOC. Among the provisions of that contract was a recognition that foster care is a temporary service with a goal of returning the child to the birth parents, if possible, and if not, to birth relatives. Pet.App., at 6a.

T.J. did well with M.H. The social workers sought to establish plans for T.J.'s permanent placement. They decided to place T.J. with M.D., his great-aunt, and planned to request a change of placement to the great-aunt at a court hearing scheduled for November 18, 1992. M.H. learned of that plan and filed a petition to adopt T.J. on November 5, 1992. At the hearing on November 18, the judge reviewing the neglect proceeding rejected the proposed immediate change of placement to the great-aunt proposed by the government, but ordered immediate psychological assessment and home studies. The great-aunt

subsequently filed for permanent legal custody, with the consent of both parents.

The adoption petition was consolidated with the custody complaint and the neglect case. The parties to the consolidated proceeding were M.H., who supported the adoption, and the District of Columbia, T.J., through his Guardian ad litem, C.J., his mother,and D.L., his father, and M.D., all of whom supported the custody. The competing adoption and custody requests were heard together.

The evidence showed that the foster mother had done a good job with T.J., and he had thrived while with her. She and the child were emotionally bonded. Breaking that bond would cause some distress to T.J. The degree and permanency of the expected distress from separation was disputed by the several expert witnesses. The benefits of placing T.J. with his great-aunt were also presented. With his great-aunt, T.J. would be raised with his sister in a loving and effective home. Evidence with respect to the great-aunt showed that she was an exceptionally able custodian, who was currently doing an excellent job of raising T.J.'s sister. Her home was the hub of the extended family that would provide significant benefits to T.J., if he were placed with her.

Evidence also established that the mother herself would not likely ever be able to care for T.J. The father had not been significantly involved in T.J.'s life, and was not considered as a potential custodian. Given the proffers of two clearly

suitable custodians, the court was clearly going to grant either the great-aunt's request for permanent legal custody or the foster mother's request for adoption.

The trial court found that both the adoptive petitioner and the great-aunt seeking permanent custody were outstanding people. The trial court concluded that, on balance, the adoption petitioner provided the better alternative for T.J. and should be granted.

The trial court used a two-step analysis in making its determination. Step one was to evaluate the evidence concerning the adoption petition. When evaluated without reference to the evidence concerning the complaint for custody, the court found that the adoption was shown to be in T.J.'s best interest. As against T.J.'s mother's objection to the grant of the adoption petition, the court found that the mother's refusal to consent was inconsistent with T.J.'s best interest and should therefore be waived. The waiver of consent is allowed under D.C. Code §16-304(e).

The grant of an adoption has the effect of terminating parental rights by operation of law. Therefore, in proceeding to the second step in its analysis, i.e., evaluation of the relative merits of the custody and the adoption, the court considered that the mother's rights had been terminated.

In its second step, the trial court evaluated the evidence supporting the great-aunt's custody complaint. Although the trial court was impressed by the great-aunt, it held that the

evidence supporting the custody complaint was, on balance, somewhat less than the evidence supporting the adoption. It credited the expert who opined that moving T.J. would result in permanent harm, rather than the experts who said that T.J. could adapt to custody by the great-aunt, with whom he had previously lived. Using a "preponderance of the evidence" standard to determine whether to grant the adoption or the custody, the court held that the adoption should be granted.

The Court of Appeals reversed, saying:

> The trial court erred in bifurcating two interrelated issues, disposing of the merits of the mother's retention of custody of the child herself as against the merits of the prospective adopter's claim, applying a clear and convincing standard, and then weighing the great-aunt's petition for custody against the petition for adoption applying the preponderance of the evidence standard. The major fallacy in this approach is that it gave far too little weight to the mother's right to choose the custodian for her child by applying an incorrect standard of proof to that consideration. [footnote omitted.]

Pet.App., at 17a. The court went on to state:

> The trial court, however, did not find, and we think from this record could not find, by clear and convincing evidence, that placement of the child with the great-aunt would be clearly contrary to the child's best interest. (footnote omitted).

Pet.App., at 29a. The appellate court directed the trial court to vacate the adoption and grant the custody. Pet.App., at 30a.

Petitioners sought re-hearing and re-hearing en banc. Re-hearing was denied by the panel, and re-hearing en banc was denied by a vote of the majority of the court. Pet.App., 41a. Two judges filed dissents, both of which focused on the appellate panel's directive to the trial court that it grant the custody.

Pet.App., 43a and 48a. Neither dissenting opinion adopted petitioner's claims that the merits panel of the Court of Appeals had prescribed an erroneous burden of proof in this case.

REASONS FOR DENYING THE WRIT

Introduction

Petitioner seeks to persuade this Court that the District of Columbia Court of Appeals has, in a ruling of broad impact, erroneously extended the scope of this Court's requirement that a parent-child relationship not be terminated on less than clear and convincing evidence. That alleged extension of the evidentiary requirement established in Santosky v. Kramer, 455 U.S. 745 (1982) is purported to impinge upon the exercise of the State's parens patriae duty. Petitioner further asserts that there are divergent appellate opinions on the issue at bar, requiring resolution by this Court. To the contrary, the Court of Appeals was circumspect in crafting a narrowly-applicable decision that does not impinge on the ability of states to protect children.

Before refuting petitioner's specific arguments, it should be noted that petitioner makes two major errors in her presentation to this Court. When those errors are excised, her petition fails utterly to satisfy the criteria for review by this Court.

First, petitioner assumes the validity of the two-step process by which the trial court terminated the parental rights

of the mother by granting the adoption of the foster mother before considering the custody complaint of the aunt and the relative merits of the custody and adoption. Had that two-step process been legally permissible, the burden of proof may rightly have been a preponderance of the evidence, as in custody litigation between parties unrelated to the child.

As observed by the Court of Appeals, the two-step process employed by the trial court ignored the fact that the custody, adoption, and neglect proceedings were consolidated for the custody and adoption trial. The purpose of such consolidation is to assure that the fact-finder has before him the entire record, so that a fully-informed judgment can be made. By its two-step analysis, the trial court treated the adoption and custody like two separate proceedings, with the adoption coming first. Grant of the adoption before considering the custody would emasculate the custody by removing its parental support as a result of the prior termination of the parental rights that is a consequence of an adoption. So treated, the aunt would be a legal stranger to T.J., as would the mother, following termination of her parental rights through the adoption. Parental consent to the aunt's complaint for custody would have been made irrelevant. Familial bonds would have been legally severed. The foster mother, with more recent custodial ties and psychological bonding, would likely have prevailed.

Petitioner appears not to have noticed the Court of Appeals' rejection of the two-step analysis of the trial court. She does

not argue that the appellate court was erroneous in that rejection. She simply goes back to the two-step analysis of the trial court as if it were set in stone and uneroded by the Court of Appeals' decision. Unless the integral approach of the Court of Appeals is shown by petitioner to be in error--and we submit that it was not and cannot be--petitioner's rationale for certiorari must fall.

Second, petitioner repeatedly asserts that the Court of Appeals pitted the best interest of the child against the right of the mother to direct the upbringing of her child. On the contrary, the Court of Appeals repeatedly states that it holds the child's best interest as the determining factor, and that the parent's selection of a custodian is a valid and necessary component of the determination of the child's best interest.

The Court of Appeals made explicit its adherence to the best interest of the child standard in ruling on this case. The court said,

> We agree with the foster mother's observation that the child's best interest should be the determining factor for the trial court. The natural mother's views, however, at least under the circumstances presented here, must be taken into consideration in determining what is in the child's best interest. [citations omitted] Moreover, in this case the guardian ad litem, i.e., the child's representative, DHS, and FLOC, the agency with legal custody of the child, all support the mother's choice of custodian.

Pet.App., 25a.

Refutation

I. **The Court of Appeals did not significantly extend the scope of this Court's decision in Santosky.**

The Court of Appeals' ruling upheld the principle that this consolidated proceeding must be viewed as a whole, rejecting the two-step analysis in which the trial court terminated the parents' rights by granting the adoption, and then went on to deny the custody as if the parents had no rights. When seen without the impairment of tunnel vision, it is a reasonable, equitable, and logical implication of Santosky that the same evidentiary standard that must be applied to the adoption, which would terminate parental rights, must also be applied to the custody, which would preserve them, in a consolidated proceeding. Since the foster mother was the only party opposing custody, that burden of proof must fall on her shoulders as part of the consolidated proceeding. The Court of Appeals did not significantly extend the scope of Santosky by requiring that the foster mother prove by clear and convincing evidence both that the adoption should be granted and that granting the designated custodian's complaint for permanent custody is contrary to the best interest of the child.

Viewing the proceeding in its entire mosaic, the Court of Appeals properly accorded the mother's right to select a custodian the weight that such a choice must be given when there has been no termination of parental rights. The mother's private interest was duly weighed, as were those of the other parties.

In this case, the foster mother was the only party adversely affected by the decision, since the aunt's complaint for custody was supported by the child,, the mother, the father, the District of Columbia, and the two social service agencies responsible for T.J.'s care. All of the parties in this cases acted appropriately except for the foster mother, who violated her contract when she petitioned to adopt T.J. less than eight months after he was temporarily placed in her care, despite a consensual plan for reunification with the aunt.

Given the purpose of the foster care system to provide temporary care pending reunification with a parent or family member, it is manifestly consistent with that purpose that a foster mother bear the same burden of proof as would the State, had it opposed the mother's plan for reunification set forth in the aunt's custody complaint. As it was, however, the aunt's custody complaint articulated the State's own plan for reunification, as well as the mother's.

Petitioner would have this Court believe that this case pits the powers that be against poor little T.J. and his beleaguered foster mother. First, T.J.'s interest, as perceived and advocated by his Guardian ad litem, his parents, and the State, and its social service agencies, is adverse to that of the foster mother. Second, as stated above, the foster mother initiated the adoption in violation of her agreement to provide temporary foster care and to support the permanency plan advocated by the agency, which was reunification with the aunt. She has been

represented in these proceedings by numerous retained and pro bono counsel, with no expense spared to assert an interest which she arrogated to the detriment of the mission and administration of the foster care system.

Contrary to petitioner's claim, the State's interest is not affected by the evidentiary standard promulgated by the Court of Appeals. If the State has prosecuted a Termination of Parental Rights against the mother, it would have been required to present clear and convincing evidence. When she initiated the adoption petition, the foster mother knew that she must prove by clear and convincing evidence that the consents of the birth parents should be waived and that the adoption was in the best interest of the child. In this case, the State, through its child care agency, opposed the adoption in favor of the custody. In any event, the State's interest is not affected by the Court of Appeals' requirement that the adopter defeat the parent's designated custodial arrangement, made pursuant to intact parental rights, by the same standard. Were the State, rather than a foster mother, seeking to terminate a parent's right to direct the upbringing of a child, the State would naturally expect to bear the same burden as when seeking to terminate all other parental rights.

II. The "Divergent Determinations" alleged among state courts do not exist when the procedure is properly viewed in its entirety.

Petitioner argues that state courts are divergent in decisions regarding the weight to be given parental choice of custodian. The alleged divergence is created by comparing cases in which there has previously been a termination of parental rights or extremely serious neglect justifying termination with cases in which no such termination of parental rights was adjudicated or would be appropriate. Unlike the West Virginia and California cases cited by petitioner, this consolidated proceeding did not involve termination of parental rights on the basis of permanent neglect. Nor was it subsequent to evidentiary proceedings establishing a basis for termination. Indeed, there was no contemplation by the government or by the Guardian ad litem of a termination proceeding, since both favored a custodial arrangement that would preserve family relationships. (Only the government or the guardian ad litem could have initiated and prosecuted a termination proceeding.) The circumstances in the cases cited are thus distinct from those in this case, and do not represent divergent opinions on the same issue. This Court does not need to review the decision here to resolve divergent opinions.

III The Court of Appeals' decision does not represent an incursion of constitutional impediments on the State's parens patriae powers.

Again, petitioner insists upon casting the Court of Appeals' analysis as pitting the child's best interest against the parents' rights. The Court of Appeals explicitly stated that it

did not view the issue in terms of that dichotomy, and that it found consideration of the child's best interest to include consideration of the parent's custodial choice. Petitioner has done to death her arguments about the two-step process, as well as her argument that the court pitted best interest against parental rights.

CONCLUSION

For the foregoing reasons, M.D. respectfully requests that this Court deny the Petition for Certiorari.

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